United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

846

No. 17,807

MELVIN JACKSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

INDEX

JOINT APPENDIX

DISTRICT OF COLUMBIA – CITY OF WASHINGTON

Before the Coroner

In the matter of	
SAMUEL W. AGURS	Case No. 28-836
Deceased	

EXCERPTS FROM CERTIFIED TRANSCRIPT OF OFFICIAL INQUEST REPORTER OF PROCEEDINGS HAD BEFORE THE CORONER, DR. RICHARD L. WHELTON, M.D., IN AND FOR THE DISTRICT OF COLUMBIA

1 November 21, 1962

Pursuant to notice theretofore given to all known interested parties, testimony in the matter of the death of SAMUEL W. Agurs was taken at an inquest before the Coroner in the District of Columbia Morgue, Washington, D. C., * * *

* * * * *

3 DET. ALFRED S. HACK

was called to the stand as a witness, and having been duly sworn by the Coroner, was examined, and testified as follows:

DIRECT EXAMINATION

BY THE CORONER:

* * * * *

6 Q. Did Melvin Jackson give you this statement? A. Melvin Jackson made no statement whatsoever.

* * * * *

7 Q. Did you talk to Melvin Jackson at the time of his arrest? A. I talked to Melvin Jackson when he was arrested at 6th and a half and N Street and on his way to the Homicide Squad Office.

Q. At what time was he arrested, roughly? A. Melvin Jackson was arrested at 10:48 P.M., December the 17th, and he arrived at the Homicide Squad office at 11:04 P.M., the 17th. He was talked to in the car. He was advised of his rights, and he didn't care to make a statement. The U. S. Attorney, Mr. Stevas, was contacted and he advised us not to make an issue of the statement but to process the defendant normally - the respondent, excuse me, normally and place him in the cell block.

Q. Was he coherent; was he sober? A. The defendant had been drinking but he was not drunk, he was sober and steady on his feet.

Q. Was the weapon recovered in this case? A. There was no weapon recovered. The shoes of the respondent were taken as evidence.

Q. Was there anything of any note about the shoes? A. There was a substance - a red substance on the toe of one of the shoes.

Q. Resembling blood? A. Resembling blood.

* * * * *

19 DELORES BROWN

was called to the stand as a witness, and having been duly sworn by the Coroner, was examined, and testified as follows:

DIRECT EXAMINATION

BY THE CORONER:

* * * * *

20 Q. * * * Would you describe briefly what you saw in this fight? A. Well, I was in the kitchen and Melvin knocked on the door and I saw Viola was coming down to open the door for him and Viola went downstairs to open the door for him, and he came up the steps cussing, saying that he was going to beat some God damn ass. That's what he said. And then he went straight to Woodrow, started beating on Woodrow, kicking him, because I came out of the kitchen and looked at it. Then I went

back into the kitchen and he still kept on beating him because you could hear the licks. Then he come into the front room and started beating on Viola Maples.

Q. Do you see Viola Maples in this room? A. Yes I do.

Q. Where is she? A. Sitting right there.

Q. All right, go ahead. A. I didn't see him beating Viola, but I heard the licks and I heard Viola hollering she didn't have his money.

21 And he kept on telling her that she did know something about the money, and she kept on telling him that she didn't know anything about the money.

Q. How long had you been in the house there? A. All day long.

Q. How long had Melvin been there? A. Melvin had been there a good little while, because Melvin had been there, been asleep.

Q. What's a good little while, two hours, four hours? A. About an hour, an hour and a half. He had been in A G's room asleep.

Q. Was he drinking? A. Oh yes he'd been drinking.

Q. Had Woodrow been drinking? A. Yes, Woodrow had been drinking.

Q. Would you say Woodrow was drunk? A. No, I wouldn't say that he was drunk, no.

Q. Would you say Melvin was drunk? A. Well, Melvin had slept some of his off. I wouldn't say that he was drunk. But you could tell he had been drinking.

Q. Did you see a pipe involved in this in any way? A. No, I didn't.

Q. Did you see Melvin hit Woodrow with a pipe? A. No, I didn't.

22 Q. Was there any weapon? A. No, I saw when he was kicking him.

* * * * *

[Filed in Open Court Dec. 10, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on November 6, 1962

THE UNITED STATES OF AMERICA	:	Criminal No. 1031-62
v.	:	Grand Jury No. 1315-62
MELVIN JACKSON,	:	Violation: 22 D.C.C. 2403
Defendant.		(Second Degree Murder)

[INDICTMENT]

The Grand Jury charges:

On or about November 17, 1962, within the District of Columbia, Melvin Jackson, with malice aforethought, murdered Samuel W. Agurs by beating him with his fists and kicking the said Samuel W. Agurs with his feet, and by other means, a more exact description of which is unknown to the Grand Jury.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

/s/ William J. Youden
Foreman.

[Filed Aug. 9, 1963]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Monday, March 11, 1963

Before the HONORABLE GEORGE L. HART, JR., U. S. District Judge, and a jury at 3:00 p.m.

* * * * *

4 A. G. ELLISON

was called as a witness by the Government and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

7 Q. Now, directing your attention to November 17, 1962, did you see Melvin Jackson that day? A. Yes, sir, he come up to the house. He come up there at my house and lay down 'cross the bed.

Q. What time was that, if you recall? A. Well, I don't know, I figure along about -- it was along about 2:00 -- may have been about 1:00 or 2:00 o'clock, something like that.

Q. All right, he came up to your house and did what? A. Laid down across my bed and -- across the foot of my bed; and I was laying in the bed because my leg was sore, like it is now.

* * * * *

Q. All right, was this in the afternoon of the 17th? A. In the afternoon.

Q. What day of the week was this; do you remember? Was it a

8 Saturday? A. I think it was Saturday. I ain't for sure now but I think it was Saturday.

Q. All right, so he came to your room about 1:00 o'clock in the afternoon and what happened then? A. Well, ain't nothing but he, Mr. what-you-call-him, he come up there, Mr. -- man that I rent from, he come up there and he made all of the boys, two of them, he made leave there.

Q. You say he made two of them leave? A. Yes, Mr. Milligan did, he told them go back downstairs.

Q. Is that Mr. Milligan, is that your landlord that did that? A. That is the landlord; that's right.

Q. Who did he make leave? A. I believe Melvin was one and another boy was one. I don't know who the other boy was but there was two of them.

* * * * *

11 Q. Woodrow; so the person known as Woodrow to you was Samuel Woodrow Agurs? A. Yes, find out since he got killed, since he got hurt, that he's Agurs. I didn't know about Agurs; that's the first time I heard of it.

* * * * *

12 Q. You say there is a door connecting your room with Woodrow's room? A. Yes, sir.

Q. Now, after the defendant, Melvin Jackson, asked you about somebody taking his money, what did he do then? A. He walked in, on in Woodrow's room and I was still laying in the bed.

Q. What happened next? A. I heard a blow or two. I don't know what happened. I didn't see it.

Q. You just take it easy now, Mr. Ellison. What did you hear -- what did you hear after he went into Woodrow's room? A. I didn't hear nothing. Look like I heard some licks passed; I don't know whether any passed or not but looked like I heard 'em. I call them blows.

THE COURT: Looked like you heard some licks passed; is that it?

THE WITNESS: That's right.

THE COURT: All right.

BY MR. COLLINS:

13 Q. Did you see what happened in that room? A. No, sir, I couldn't see.

Q. Did you hear any conversation? A. No, I didn't hear no conversation.

Q. What did you do when you heard these licks being passed in there? A. After I heard them licks being passed in there, I come in there and I went in the room.

Q. What did you see when you went in the room? A. When I went in the room, I -- he was laying on the floor.

Q. Who was laying on the floor? A. Woodrow Agurs.

Q. All right, and where was Melvin Jackson? A. I didn't see Melvin. Melvin was done gone.

* * * * *

Q. Can you read and write? A. Not so good; I can't see. My eyesight is bad. This one is out and I can't see out of this one much good at all.

Q. Do you remember signing any statement in this case?

A. Yes, I think I signed one -- know I did.

Q. Did you sign a statement at the Homicide Squad on November 16, 1962? A. I think so. If I did, see, I didn't know what I was doing if I did do it, tell the truth, because I couldn't read nor write. I just done what they told me to do.

Q. You didn't know what you were doing at that time? A. That's right.

Q. Do you remember talking to the officers down there? Did you tell the officers what had happened? A. Sure I told them best I knowed how.

* * * * *

Q. He lay down in your room the first time; is that right?

A. Yes, sir.

Q. Then he left; is that right? A. That's right.

Q. And then he came back again; is that right? A. Yes, sir, that's right. Yes, sir, that's right, again.

Q. And now when he came back the second time, did he have any conversation with Viola? A. Let me see now. Let me get that thing right, straight. I think he slapped Viola.

Q. What else did he do to Viola? A. That's all I know that he done.

Q. Well, tell us about when he slapped Viola. When did he slap Viola? A. That's all I know. That's all I know, he slapped Viola.

Q. When? A. That was on the second time. He was there.

Q. Before he went into Agurs' room or after he went into Agurs' room? A. No, he'd done been in Agurs' room then; he had done been in there.

* * * * *

17 Q. When did he hit Viola? A. After he come out of Woodrow's room.

Q. Are you sure about that? A. That's right.

Q. All right, then you say you went into Woodrow' room?

A. Say I went in there?

Q. Did you testify a few minutes ago that you then went into Woodrow's room? A. Yes, look, see him laying on the floor. I didn't go in the room. I went to the door, see him laying on the floor.

Q. What did you see when you went in there? A. I see something like water running out of his mouth.

18 Q. And where was he? A. Laying on the floor.

* * * * *

19 Q. Now, did you observe Melvin Jackson at this time as to whether he was drunk or sober? A. If he was drinking, I couldn't tell it.

* * * * *

Q. All right, now did you observe Samuel Woodrow Agurs' condition as to whether or not he had been drinking? A. Well, I couldn't

20 tell whether he was drinking or not.

Q. Did you see either one of them drinking? A. I didn't see none of them drink because I was laying in a bed.

Q. Well, where was Woodrow during the time that Jackson had been there earlier that afternoon? What was Woodrow doing during that time? A. Well, Woodrow was laying in bed far as I know.

Q. In his room? A. That is where he'd -- heard the boys say -- say he was laying in his own room in the bed.

Q. Now, did you see --

THE COURT: Wait a minute.

MR. COLLINS: Sorry, Your Honor.

THE COURT: You heard the boys say --

THE WITNESS: No, I knowed; I was laying in bed, is my own bed.

THE COURT: No, how about Woodrow? How did you know he was in bed?

THE WITNESS: I heard some of the boys say he's in bed. That's a long, tall boy up there. I forget his name.

* * * * *

21 CROSS EXAMINATION

BY MR. INGOLDSBY:

Q. Mr. Ellison, are you employed? Do you work? A. No, sir, I am on welfare.

Q. You work on the Welfare? A. Yes, sir.

Q. How long have you been on the welfare? A. About three or four years, going on three or four years.

Q. And you haven't worked anyplace else during that time? A. No, sir.

Q. Do you know what "Smoke" is? A. Do I know what it is?

Q. Yes, sir. A. Yes, sir, I see a whole lot of it.

* * * * *

22 Q. Do you drink smoke? A. I have drank it myself.

* * * * *

Q. On November 17, last November 17th, date when all this happened at your house, were you drinking "smoke" that day? A. No, sir.

23 Q. What were you drinking? A. I wasn't drinking nothing, not a thing. I wasn't able to drink because I didn't have no money. If I had any money, I'd have been drinking some wine but I wouldn't have been drinking no "smoke".

Q. Didn't you get some money that day from Melvin Jackson, this man here? A. No, sir.

* * * * *

24 Q. Now, the man that died was named Woodrow; is that right? A. Yes, that's right, and he drank it.

Q. He drank smoke? A. I know that he drank it. That's telling the truth.

Q. Had he been drinking it the day he died? A. If he had been drinking that day, I don't know but I know he drank it.

* * * * *

25 REDIRECT EXAMINATION

BY MR. COLLINS:

Q. Now, this Viola Maples that you mention; do you know where she is today? A. She is in the hospital, I heard.

Q. Do you know why she was in the hospital? A. Say that she got a leg broke.

MR. COLLINS: All right, that's all, Your Honor.

THE COURT: Wait just a minute, Mr. Ellison.

THE WITNESS: Yes, sir.

THE COURT: You heard some slapping around in Woodrow's room; then you went in and found him on the floor; is that right?

THE WITNESS: That's right.

THE COURT: Now when had been the last time you had actually seen him before that?

THE WITNESS: Woodrow; I seen him before that evening.

THE COURT: That evening.

26 THE WITNESS: I seen Woodrow at -- it was on Friday evening, I believe, before Friday evening; and then Saturday when he got killed, Saturday evening he got killed.

THE COURT: Well now, this was Saturday that Melvin was in your room, wasn't it?

THE WITNESS: Yes, sir.

THE COURT: Well now had you actually seen him on Saturday?

THE WITNESS: No, sir, I hadn't seen him.

THE COURT: You hadn't been in his room, hadn't seen him?

THE WITNESS: No, sir, hadn't been in his room, hadn't seen him.

* * * * *

27 ALBERT BROWN

was called as a witness by the Government and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

28 DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

30 Q. Now, I direct your attention to the afternoon of November 17, 1962, and I ask you if you were in your room that afternoon? A. Yes.

Q. And did you have occasion to see the defendant, Melvin Jackson that afternoon? A. Yes.

Q. When did you first see him? A. I seen him when he was knocking on the door.

Q. What door is that? A. Down the front door.

Q. Is that the door from the street? A. Yes.

Q. All right now what happened after he knocked at the door? A. Well, Viola, she went downstairs and she let him in.

31 Q. Is that Viola Maples? A. Yes.

Q. All right, what happened then? A. She start up the steps. Melvin come up the steps behind her. When he got up the steps he said somebody had taken $18 from him.

MR. INGOLDSBY: May we find out what time this is, please?

BY MR. COLLINS:

Q. What time of day was this? A. Oh, it was between 4:00 and 4:30, somewhere between there.

Q. All right. A. And he says somebody had taken $18 from him, and so he told Viola that he believe that she knows something about it because her and Frank had taken some money from him on Sixteenth Street.

Q. Who was Frank? A. That's Viola's old man.

Q. Well, what is his last name? Do you know? A. No, I don't. We always called him Frank.

THE COURT: What do you mean by "old man"? Father, is that?

THE WITNESS: No, boy friend.

THE COURT: Oh, a boyfriend.

32 BY MR. COLLINS:

Q. All right, then what happened after he said that to her? A. Then Willa Mae, she went to get up and he told Willa Mae to set back down.

Q. Is that Willa Mae Burwell? A. Yes.

Q. Where were you while all this was going on? A. I had come from my room back to the kitchen.

Q. That is up by the front room, is it? A. Yes.

Q. All right, and after he told her to sit down, what happened then? A. He tooken and slapped her.

Q. Slapped who? A. Willa Mae -- I mean Viola; he started beating her, and then he went back into Woodrow's room and you could hear licks because the door just like that, you walk out to the kitchen into E. J.'s room, E. J. Ellison's room.

Q. That is the front room, is it? A. Yes, and Woodrow's room adjoins the front room, and there's a sliding door in between, and he keeps that door open because they, you know, go in there and drink together all the time and so Woodrow started hollering, said "Man, I haven't got your money," and you could hear Melvin hitting Woodrow; and then Woodrow --

33 MR. INGOLDSBY: I object to that and move it be stricken.

BY MR. COLLINS:

Q. How did you know it was Woodrow? A. Well, Woodrow said "Man, I ain't got your money."

THE COURT: Well, you heard somebody hitting Woodrow; is that right?

THE WITNESS: Yes, I could hear the licks. Wasn't nobody in there but them two.

THE COURT: All right.

BY MR. COLLINS:

Q. Now, did Melvin Jackson say anything? A. Well, he come about the front room, say he be back tomorrow and said he didn't care if he got 25 years.

Q. Did he say anything while he was in the room with Woodrow? A. I didn't hear him say nothing. I just hear the licks.

* * * * *

34 Q. What did you do then? A. I went into Woodrow's room and he was laying on the floor and his eyes was open and blood was on his face, and I went down into the street. That's when I got the two policemen, and I told the two policemen that I believe that man up there was dead, and that when they came up there.

* * * * *

Q. All right now when you went into Woodrow's room after this incident had taken place, did you notice the room particularly? A. Yes, he had a mattress that was -- mattress had slid off the -- mattress had slid off the bed onto the floor and Woodrow was laying on his back. His eyes was open.

* * * * *

Q. By the way, was Woodrow drunk? A. He had been drinking.

Q. Heavily? A. No.

Q. How about the defendant, Melvin Jackson? A. He had been drinking but he had done slept it off.

* * * * *

36 CROSS EXAMINATION

BY MR. INGOLDSBY:

* * * * *

Q. Who is -- do you do any work for Big Rose? A. Yes, I do.

Q. Who is Big Rose? A. Well, she has a house up on 733 Madison Street and me and Melvin did some moving for her one time.

Q. And do you work for her selling whiskey in the alley --

MR. COLLINS: Objection to this, Your Honor.

MR. INGOLDSBY: -- in the back of 6-1/2 N Street?

THE COURT: Wait just a minute. I sustain that objection. If he has been convicted of it, you may bring that out.

MR. INGOLDSBY: No, I wasn't trying to show credibility, Your Honor. I was trying to show the nature of the witness' employment.

THE COURT: Well, I sustain the objection.

* * * * *

37 [BY MR. INGOLDSBY:]

Q. Um humm, and where were you when Melvin went through

38 that sliding door? A. Right there by the kitchen.

Q. And you could not see from the kitchen into the room that Melvin had just gone into, could you? A. Sure, you can. It's right like that kitchen right there, and E. J.'s room is right there. He was standing right in the kitchen, look right into his room.

Q. And were you looking? A. Sure.

Q. What did you see? A. I seen Melvin when he went in there and told Viola that she believed that her friend had his money because she -- her and her old man had taken his money up on Sixteenth Street, and then he went into Woodrow's room.

Q. You saw him go in Woodrow's room? A. Yes.

Q. And that's all you saw; isn't it? A. I saw him hit Viola too.

* * * * *

40 Washington, D. C.
Tuesday, March 12, 1963

* * * * *

42 THE COURT: Ladies and gentlemen of the jury, we are about to have Dr. Rayford testify as to an autopsy that he performed. Counsel for the Government and counsel for the defendant stipulate that the body on which Dr. Rayford performed the autopsy and concerning which he is about to testify, was the body of Samuel Woodrow Agurs.

Is that agreeable to the Government?

MR. COLLINS: Yes, Your Honor.

THE COURT: Is that agreeable to the defendant?

MR. INGOLDSBY: Yes.

* * * * *

43 LINWOOD L. RAYFORD, JR.

was called as a witness by the Government and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

44 Q. All right, and did you respond to 614 N Street, Northwest?

A. I did.

Q. And will you tell us what you did when you arrived there?

A. When I arrived there I found the man who was dead. There was no

45 evidence of rigor mortis setting in but the body was beginning to get cool and I pronounced it lifeless.

Q. Did you pronounce the deceased dead at that time? A. I did.

Q. Was this Samuel Woodrow Agurs that you pronounced --

A. He was subsequently identified to me as Samuel Agurs.

* * * * *

Q. All right, and would you describe his condition at the time that you saw him there? A. Oh, he was quite bloody and bruised; * * *

* * * * *

Q. All right, now I direct your attention to November 18th and ask you if you had occasion to perform an autopsy on the body of Samuel Woodrow Agurs? A. I did.

Q. And where was that? A. This was performed in the District Morgue.

Q. And what time was that autopsy performed, if you recall?

A. Nine-thirty a.m.

46 Q. All right, now as a result of your autopsy, what did you find as to the condition of this body?

* * * * *

THE WITNESS: There was a one-and-one-half inch transverse laceration of the left upper eye lid just beneath the eyebrow.

THE COURT: Point that out -- excuse me, go ahead.

THE WITNESS: One and a half inches in length, left eye lid, just below the eyebrow. There was a fracture of the nose with a slight displacement of the nose to the left, and there was blood also on the nose.

There was a one-third -- approximately this small -- laceration of the lower lip which went full thickness all the way through the lip to the inner side, and there was a fragment, a black fragment that appeared to be leather that was one-quarter inch in diameter, raised dimension, found in this wound in the lip.

There were contusions and abrasions about the chin, left cheek and around the right eye. This was on external examination.

BY MR. COLLINS:

* * * * *

47 Q. All right, now as a result of the autopsy that you performed, were you able to arrive at the cause of this man's death? A. I was.

Q. And what was that? A. The death was from asphyxia due to aspiration of blood and gastric content due to trauma about the face and head.

Q. Could you explain that to the jury in laymen's terms if you can, Doctor? A. The result of fairly extensive beating about the head and neck and fractured nose, blood escaped from the nose and some of it having been swallowed into the stomach was also aspirated into the trachial bronchial tubes. This is in the lungs, had blocked up the lungs preventing the lungs from becoming aerated.

THE COURT: What do you mean by aspirated, Doctor?

THE WITNESS: I mean by that that blood which normally might go down the gullet, the esophagus, into the stomach, went in the respiratory passages in the bronchus, which goes to the lungs.

THE COURT: You in effect, breathe it into your lungs, the blood?

48 THE WITNESS: That's correct, thank you.

BY MR. COLLINS:

Q. Now, Doctor, could you explain to the jury what relation the trauma to the head would have to the asphyxiation? A. The most obvious reason would be the blood which plugged the respiratory passages came from the fractured nose and lacerated lip.

Q. All right, and is it your opinion that the blows to the head sustained by this deceased person were the proximate cause of his death? A. It is my opinion.

Q. Now, Doctor, did you perform an alcohol test on the body of the deceased? A. I did.

Q. And would you tell us what you found as a result of that? A. 0.37 per cent.

Q. And what is that? Blood alcohol? A. This is blood alcohol.

Q. Would you explain to His Honor and the jury what that means? A. This means that Mr. Agurs had at the time of his demise a blood level of alcohol high enough to render him almost comatose.

49 MR. INGOLDSBY: Almost what?

THE WITNESS: Comatose or helpless.

MR. INGOLDSBY: Helpless?

THE WITNESS: Or helpless.

BY MR. COLLINS:

Q. And would this particular condition also render him in a drunken condition? A. Indeed, yes.

Q. Now, you say that the percentage --

THE COURT: In other words, this is enough to be dead drunk, so to speak?

THE WITNESS: Just about; there are a couple of other percentages that people like to have to call them dead drunk but this was right on the borderline.

* * * * *

BY MR. COLLINS:

Q. Now, this percentage of blood alcohol that you found, was that

the percentage at the time of autopsy or at the time of his death?

A. This was the percentage at the time of the autopsy but --

Q. And at the time of his death would it have been greater?

A. It would not have been significantly changed in that time.

* * * * *

50 CROSS EXAMINATION

BY MR. INGOLDSBY:

* * * * *

Q. And I believe you stated that the principal or most immediate cause of death was blood congesting or clogging the lungs; correct?

A. Blood which blocked the lungs, yes.

Q. Where did that blood come from? A. From both his cut lip and his broken nose.

Q. Would you say that the drunken condition of this man, or the high level of alcohol contained in his system, had a bearing on this man's inability to dispose of this blood in his system? A. I would say that it could have some bearing, yes.

Q. What would a person normally do to dispose of this blood if

51 they were in a sober condition and attempting to get rid of the blood? A. The normal response, normal response of the body would be to cough this material up. The cough reflex is one of the last ones to go in this type of situation.

Q. Why did that not happen in this case? A. I believe the combination of the trauma to his head and probably his drunken condition as well.

* * * * *

52 DELORES BERNICE BROWN

was called as a witness by the Government and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

56 Q. All right, now after Melvin Jackson and these others got put

out, what happened then? A. Well, a little after that, Melvin came back. Melvin Jackson came back and he knocked on the front door. I was looking out the kitchen window and he asked me to open the front door and I told him that Viola Maple was coming in. She would open the front door, so Viola Maple went down and opened the front door at the time Melvin Jackson came up the steps real fast, swearing.

Q. Swearing? A. Yes, cussing.

Q. All right, go ahead. A. And say that his money, somebody had taken his money. And that he knew who had taken it and that he wasn't going to stop until he got to 'em, and he went into Woodrow's room, kept straight through A. G. Ellison's room to Woodrow's room.

* * * * *

57 Q. All right, so he came into Ellison's room, went into Woodrow's room? A. He went into Woodrow's room; that's where he jumped on Woodrow.

Q. Did you see him do that? A. I saw him stomp Woodrow, yes, sir.

Q. All right, tell us exactly what you saw after the defendant went into Woodrow's room? Where did you go so that you could see what happened there? A. I stood -- they had sliding doors. The door was open and I stood in between them, was watching Melvin Jackson when he was stomping Woodrow.

Q. Well, you say "stomping." Would you describe from the time Woodrow went into the room, from the time that the defendant went into Woodrow's room; tell us exactly what you saw him do. A. The time that he went into the room, Woodrow was laying on his bed. He must have knocked him off the bed because when I saw him, Woodrow was behind the bed and that is when I saw Melvin Jackson with one hand pressed

58 on the side of the wall and his other hand was at his side and he was just stomping him; and Woodrow kept on telling him that he didn't know anything about the money, that he hadn't taken any money from him.

Q. When you say "stomping" do you mean kicking? A. Just lifting up his feet, letting it down.

Q. Where was he stomping Woodrow? What part of Woodrow's

body? A. Up his head.

Q. How many times did he do that that you saw? A. Well, about six or seven times, just kept on.

Q. And was Woodrow fighting back? A. No.

Q. Did Woodrow have any kind of a weapon? A. I didn't see him with ank kind of a weapon.

Q. And how long did this stomping go on? A. Oh, about five minutes or so.

* * * * *

60 Q. After he had beaten Woodrow, did he then attempt to find any money in there? A. No, I didn't see him, no.

Q. Now, did you observe Melvin Jackson's condition as to whether he was sober or drunk? A. Melvin Jackson had been drinking as I said before, but he had later laid across Mr. Ellison's bed and he had slept some of his off and you could tell that he had been under the influence of alcohol.

Q. Well, let me ask you this: Did he appear to know what he was doing at that time? A. To me he did, yes.

* * * * *

CROSS EXAMINATION

BY MR. INGOLDSBY:

* * * * *

63 Q. And you saw the whole thing, didn't you, from the time that Melvin went into the room until the time that he came out; you saw everything, didn't you? A. Yes, I saw that, um hum.

* * * * *

Now, did you see Woodrow strike Melvin at all? A. Not al all, uh uh.

Q. Did you hear any licks passed? A. The licks, the only licks that I heard passed was when -- with Viola, with Viola Maple, but I didn't see it, but I heard the licks passed with her.

64 * * * * *

EDWARD MILLIGAN

was called as a witness by the Government and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

Q. Now, did you see Melvin Jackson on the afternoon of November 17, 1962? A. Yes.

Q. Where was that? A. 614 N, North --

Q. And -- 614 N Street, Northwest? A. That's right.

Q. Now, would you tell His Honor and this jury under what circumstances you saw him that afternoon? A. Well, when I walked in the front room he was laying cross the bed and then four or five more fellows sitting around, so I told 'em, too many in one room; Police ain't going to have this going on. So he got up, and called me two more boys.

Q. And did they go? A. Yes, I left them on the sidewalk.

Q. Where did you go after you -- A. I went on back home.

Q. All right, continue. A. So about ten minutes after, fifteen minutes, somebody knocked at the door; so I went down to the door. So Melvin told me, says "You know these people taken $15 off me."

Q. Could you slow down? I didn't get that. Melvin, you say, came to your door? A. That's right.

Q. And what happened when he came to your door? A. I was upstairs, see, and I come on down the door. When I got down the door, Melvin says these people, Woodrow, just beaten Woodrow, said he had stolen $15.

Q. Did he say anything else? A. Stealing $15 off him.

Q. What did you do then? A. I told him, call the man, call the Police; so I went on back upstairs.

* * * * *

72 WARREN L. COPELAND

was called as a witness by the Government and, being first duly sworn by the deputy clerk, tood the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

75 Q. Now, at the time that you arrested the defendant, do you recall what kind of clothes he was wearing? A. No, I can't exactly recall the exact type of clothes he had on. I don't remember now.

Q. Did you check his clothing? A. Yes, I noticed -- we did notice that on his trousers it had a blood stain, stains at the bottom.

Q. All right, now how about his shoes? Did you notice his shoes? A. Yes, they had blood stain also on his shoes.

* * * * *

Q. All right, now in the course of going to the Homicide Squad, did you have any conversation wtih the defendant Melvin Jackson?

A. Yes, they -- Detective from Homicide Squad advised Melvin Jackson of his rights and told him that anything that he said would be used against him and he asked him to tell him what happened and Melvin Jackson stated that Woodrow, as he walked in the room, Woodrow fell across the

76 bed and then, detective -- told him that "You mean Woodrow fell across the bed and had all those injuries on him?" and then Woodrow -- then the defendant Melvin Jackson changed it and said "No, he fell on the floor."

* * * * *

77 ALFRED S. HACK

was called as a witness by the Government and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. COLLINS:

* * * * *

81 THE WITNESS: The schedule, the time schedule which is made

up on this case, shows that Melvin Jackson was placed under arrest at 10:48 p.m. and that Detective Preston and I arrived on the scene at 10:49 p.m. and we arrived at the office of the Homicide Squad at 11:04 p.m.

[BY MR. COLLINS:]

Q. All right, now during the course of the trip from 6 1/2 N to the Homicide Squad, was there any conversation with the defendant? A. There was a conversation with the defendant in which he was apprised of the decedent's death.

82 Q. And what did the defendant say at that time? A. I don't remember the exact words but he denied any knowledge of the death, that he told several stories.

Q. Well, tell us what he said if you recall. A. One story was that he had returned to 614 N after having spent the afternoon there. He had left and returned a short while later and he entered the room with Samuel Agurs and as he entered the room, Mr. Agurs collapsed to the floor in an unconscious condition.

When pressed, or when asked to elaborate a little bit, he said that the decedent, Mr. Agurs, had collapsed to the bed when he walked into the room and, again, at the Homicide Squad office --

* * * * *

83 Q. All right, now, what I am driving at is, you say that you had a further conversation upon arrival at the Homicide Squad with the defendant. A. Right.

Q. And what was that conversation? A. Conversation there was similar to that which took place in the cruiser where he stated that he had entered the room with Agurs and Agurs had fallen to the floor.

Q. Now, during any of these conversations, did he say anything about Agurs taking any money from him? A. No, sir, he did not.

Q. Did he say anything about any person named Viola Maples taking any money from him? A. No, sir, he denied having any fight at all with the decedent.

Q. All right, now at the time that you placed him in the cruiser, or later at the Homicide Squad, did you have occasion to notice anything unusual about his clothing? A. There -- on his shoes there was a stain, a fresh stain, having the appearance of blood and also on the lower trou-
84 ser legs there were stains having the appearance of blood.

Q. All right, now, when he arrived at the Homicide Squad, did he surrender these items of clothing to you? A. Yes, sir, he did.

Q. And what time was that? A. That was at 11:25 p.m.

MR. COLLINS: Your Honor, might I have this marked as Government Exhibit Number 1 for identification?

THE COURT: It may be so marked.

(Pair of shoes was marked for identification as Government's Exhibit Number 1.)

* * * * *

BY MR. COLLINS:

Q. Now, I show you what has been marked as Government Exhibit Number 1 for identification and I ask you what that exhibit is? A. This is a pair of shoes removed from Mr. Jackson in the office of the Homicide Squad and I identify them through the initials that I placed in the inside of the shoes.

Q. Now, you have earlier testified that you noticed some stains on the shoes resembling blood. Can you point that out to the jury, His Honor and the jury? A. There are stains in the area of both toes and
85 on the instep of the left shoe.

MR. COLLINS: All right, might this be marked as Government's Exhibit Number 2 for identification, Your Honor?

THE COURT: It may be so marked.

(Pair of trousers were marked as Government's Exhibit Number 2 for identification.)

* * * * *

86 MR. COLLINS: Your Honor, at this time, I will offer Government Exhibits 1 and 2 in evidence and ask that the jury be allowed to see these.

MR. INGOLDSBY: No objection.

THE COURT: They will be admitted without objection.

(Government's Exhibits Nos. 1 and 2, pair of shoes and pair of trousers, respectively, were admitted into evidence.)

* * * * *

91 MR. COLLINS: That is the Government's case, Your Honor. The Government rests.

THE COURT: All right.

MR. INGOLDSBY: I'd like to make a motion at this time, Your Honor.

THE COURT: Well, come to the bench?

92 AT THE BENCH:

THE COURT: Your Motion is to enter a judgment of acquittal?

MR. INGOLDSBY: Yes, Your Honor.

THE COURT: Do you want to say why?

MR. INGOLDSBY: Yes, Your Honor, on the grounds that there has been no evidence which links this defendant with the death of Woodrow Agurs. There is not one witness who testifies to having seen anything which took place there with the exception of this Brown girl and her testimony is in direct conflict with the testimony of other witnesses and with the testimony of the deputy coroner.

Secondly, Your Honor, from the stand point of the second degree murder charge, there has been no showing of -- let me put it this way: If there is any showing of a homicide, there is no showing of the elements that constitute second degree murder.

THE COURT: I disagree with you. I think there is every element of second degree murder here and I'll overrule the motion; deny the motion.

* * * * *

93 MELVIN JACKSON

the defendant, was called as a witness in his own behalf and, being first duly sworn by the deputy clerk, took the stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. INGOLDSBY:

Q. You speak slowly and loud enough so the jury can hear you. State your full name, please. A. Melvin Jackson.

Q. And prior to the time of your arrest, where were you living? A. 926 L Street, Northwest.

Q. And when were you arrested? A. On a Saturday, Saturday night.

Q. November 17, 1962? A. I think so.

Q. Have you been in jail from that time until this? A. Yes, sir.

Q. What was your occupation prior to the time you were arrested? A. I was a janitor for Harris.

Q. What? A. Janitor for Harrison & Adams, Real Estate Company.

Q. Did you work every day? A. I work every day. I am a janitor

94 and work part-time every day, in the day with the carpenters.

* * * * *

Q. And, in your own words, go ahead and tell the jury what happened on this day, November 17th? A. On Saturday, evening, about 12:30, I was coming from 6 1/2 Street --

THE COURT: Now, you say evening. You mean what we call the afternoon, I take it. It was daylight, wasn't it?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE WITNESS: I was coming from 6 1/2 Street to N Street and Viola Maples called me from 614, apartment on the second floor, 614, Apartment 614; and she told me A. G. Ellison said to come upstairs and I went upstairs and A. G. showed me a stove that was laying in the floor and asked me what could I do for it, could I fix it. I told him --

I looked at it. And I told him yes. I told him I wouldn't fix it unless Mr. Ed, his landlord, paid me.

95 * * * * *

A. And then sitting there talking to A. G., Viola and Woodrow Agurs; and Samuel W. Agurs, Woodrow Agurs asked me for some change, money. I told him, I said "I haven't got any money," just like that; and he said "Oh come on, let us have enough money to get a drink with," and then I run my hand in my pocket. I say "I ain't got nothing but some change," and pulled out and gave him the sum of 45 cents. I said "Will that help you?" He said "That's enough."

Q. He said what? A. He said that was enough.

And then I walked and then I sat on the side of A. G.'s bed and Woodrow Agurs went to the store. I and A.G. was talking and Woodrow come back. He got a fifth bottle from somewhere, I don't know, someplace, some house there, and he had some water in it and this drink he

96 had, he poured some together.

Q. I can't hear you. A. This drink he had, he pours it together and shakes it up and shakes it, put a finger in it and shake it, and it popped two or three times and then he taste it and he said it was whiskey.

Q. He said what? A. He cleared his trhoat and said it was whiskey, and so then he offered Viola Maples a drink. She got a bottle and taken some. Got a jug, look like a jug, some kind of jar, some kind of jelly; and A. G. spoke up, said "Let Pop take some." A. G. Ellison spoke up, said "Let Pop take some," and he hand A. G. Ellison a bottle. A.C. got him some and he taken a drink and put the cap back on; so then all of them was happy and I laid back on the bed because I had been up all night, just about all night, Friday night, working; and --

Q. Did you take a drink out of this bottle? A. No, I don't -- I don't drink.

Q. How long has it been since you have had a drink? A. Oh, I say now about a year and months, about a year and some months. I can't recall rightly, exactly.

Q. All right. A. So I laid back on A. G.'s bed. I figured everybody was happy; and so by me laying back, I dozed off to sleep. When

97 I dozed off to sleep there was Woodrow, Viola and A.G. in the room; and when I awakened there was about four -- four o'clock, I say. I look at my watch, it was four o'clock; and Mr. Ed Milligan was in the door. He was talking to A. G. and A. G. was talking to him about the stove. A. G. was telling him that he had me up there to fix the stove and then he asked me what would it take to fix the stove. I told him --

Q. Pardon me, but you lost me someplace. You woke up and did you say when you woke up that Milligan was there? A. That's right, he was standing in the door.

Q. And was that about 4:00 o'clock? A. That was about 4:00 o'clock because I looked at my watch when I woke up.

Q. Go ahead. A. And he was talking to A. G. about the stove. Him and A. G. was talking about the stove. Then he asked me a question, what would it take to fix the stove. I told him it was leaking around the bottom. I told him I had some stop leak which I used to stop radiator leak which I would use that on and he asked me, say, "Will that stop it?" I said "If it don't stop it, give me a piece of change; I can get something up to the hardward store will stop it. So he reached in his pocket, gave me 50 cents and he said "That's all the change I got. I'll pay you the rest of it." And that's all that was said.

98 We went on downstairs together and I start -- I mean I left Mr. Ed downstairs on N Street, and I started to cross N Street over on the other side. I gots across N Street onto the other side and I felt for my boiler room keys.

Q. What? A. Boiler room keys; I felt for my boiler room keys, because I have a bunch of them on my bunch of keys, and searching for them, I felt for my money and it was gone; and I searched myself too a nd searched myself good, stood there; and then I turned to go back and go over to 614 and knocks on the door and Viola say "I'll be down." She come down and I goes up the steps and goes back to A.G.'s room and asked A. G., which was sitting on the bed --

Q. Now, A. G. is Ellison? A. A. G. Ellison; that's right, and I asked him, I said "A.G.," I says, "You seen anybody in my pocket getting any money or did you get my money?" and he told me, he said "Melvin," said "I taken a drink and I dropped off to sleep just like you," and then I asked Viola Maples, and Viola Maples in turn, she said "No," she didn't know nothing about no money and went out the room; and I went toward the hall. I couldn't say she went in the kitchen or where but she went toward the hall. She went outside. Then I asked A. G., was Woodrow in, and Woodrow himself answered, said "Yes, here I am back here sick," and I walked to his doorsill, was a slide-open door. Standing to the left of A. G.'s room is a door in the side. I asked him "What's
99 the matter?" He said "My wind is cutting off." I said "What?" He said "My breath is cutting off," just like that. I said "What's the matter?" And he was standing about not from the foot -- he wasn't standing at the foot of the bed but he was standing right up from the foot of the bed. He wasn't standing at the foot of the bed but he was standing right up from the foot of the bed. He wasn't standing at the foot of the bed. So, and I told him, I said, "Man, don't complain like that," I said, "Come on, tell me about my money," just like that. He didn't say nothing but he was catching his breath hard, had his head down, and so I asked him again, I said "Woodrow," I said "Do you know who got my money?" He said "I tell you, you find your money yourself. I'm sick," and he turned from me. He went to turn back toward the bed, turning from me toward the bed, and then he fell; and I stood there for a few minutes thinking that it was just a drunk fall, that he was drunk, and he didn't get up; so I picked him up, stood him up and turned him around to me and turned him around, and I seen he had blood on his face.

I then turned and set him down on the bed on the side of the bed, which bed the mattresses was turned acrossways of the bed, the top mattresses were. I set him on the foot or pretty close to the foot of the other box mattress -- I call it a box mattress, and I called A. G. Ellison, I said, "A.G.," I said, 'Do you have a rag?" He say "I'm in

the bed. I can't get up," just like that; and so I asked Woodrow, said "Can you set here until I get a rag out of A.G.'s room?" and he said -- shook his head yes, didn't say nothing, shook his head and -- yes -- and I turned him loose. I left him there and went in A.G.'s room to get a rag and I come back, he had done tumbled over the bed, what I mean, tumbled, fell over off the bed on his knees, and his head against the wall, which the door, which the sliding door wasn't open against the wall, which the -- against the wall, which the sliding door was, which wasn't open. The door which wasn't -- part of the sliding door wasn't open. His head was against that.

100 Then I pulled him away from that wall about, approximately six or seven inches and shove the door back, shove this side of the door back where I could see him, and picked his head up and washed his face and lays his hand on his head. Then I turned and throwed the rag in A. G.'s room in the trash.

Come back to A.G., said "Woodrow is hurt bad." He said "How bad?" I said "I don't know but he bled at the nose and at the mouth," and I said "I'm going and call, tell Mr. Ed Milligan downstairs call the ambulance," just like that; and I left the room.

Then I goes down the stairs and out.

Q. And you went where? A. To Mr. Ed Milligan, and tells him about it, tell him Woodrow had had one of those spells, one of those

101 shortage of breath spells and fell down and hurt hisself. Then I goes to my job, leave there and goes to my job because I was late for work already for heating. It was heating.

* * * * *

102 CROSS EXAMINATION

BY MR. COLLINS:

* * * * *

103 Q. And but it is your testimony that you don't drink? A. That's right.

* * * * *

Q. How long had you known Woodrow Agurs prior to his death?

194 A. Ever since 1950.

Q. And was he a friend of yours? A. He was.

Q. You used to drink with him, didn't you? A. I did.

Q. In fact, you were drinking with him the day that he got killed?

A. Nope.

* * * * *

Q. You weren't sitting outside there, 614 N, drinking with him?

A. No, I wasn't sitting outside 614 N drinking with him because I had been working all morning.

Q. Well, you said that he went to -- he went out and got some money for some whiskey, didn't he? A. He didn't go out and get no money. He got some money from me.

Q. For what? A. To get him a drink.

Q. Did he bring a bottle back with him? A. Sure enough -- he sure did.

Q. But yet you say you didn't drink any of it? A. No, I didn't.

Q. Did you go to sleep in Ellison's room? A. I did.

105 * * * * *

Q. In other words then, the witnesses that have testified that you were drinking are wrong; is that right? A. I'm going to tell you, I believe they are wrong. I know they're wrong.

Q. They didn't see you drinking at all? A. They didn't see me

106 drinking nothing.

* * * * *

108 Q. So he's also wrong when he says he did that? A. I'm going to tell you, Mr. Ed Milligan and the witnesses have made the testimony wrong against me.

Q. I see; they are all wrong; is that right? A. That's right, they haven't told the truth.

* * * * *

117 Q. Did you find any money on him? A. I didn't search him.

Q. When he fell, where did he fall? A. He fell towards the -- his front door, fell towards his front door from where the head of the bed is.

Q. Toward the door that leads to Ellison's room? A. Towards the door that leads to his front door, out his door, not Ellison's door, not the double door coming from Ellison's to his door, fell to his front door where he got out the door.

Q. You say that you didn't hit him at all? A. I did not.

Q. How do you account for the lacerations, bruises and cuts on his face? A. I can't give an account for them.

Q. You can't? A. I can't give an account for them. When I picked him up I seen the blood on his lip and coming from his nose.

118 I can't give an account for that because I don't know how he come by 'em.

Q. Well, you -- he didn't have any cuts on him when he was in there drinking with you, did he? A. He did not.

* * * * *

Q. I see, so you don't know anything about how he got the marks on his face? A. I don't know anything about it.

Q. Now, when you saw him, he was bloody, wasn't he? A. When I picked him up from the floor, he was beaten, nose was bleeding and he had blood on his mouth.

Q. You say when you picked him up off the floor. What did you do with him when you picked him up? A. I picked him up and set him on the side of the bed not quite a foot from his bed.

119 * * * * *

Q. So then who did you call for help? A. I didn't call anyone. I asked Woodrow Agurs, I said "Can you set here?" because he was breathing pretty long, look like to me at the time, and he shake his head yes, like this, yes (indicating) and I turns him loose and goes in A. G.'s room and looked behind the big sofa chair and gets a rag

out of his clothes which I didn't know was clean or dirty but looked to be presentable enough to wipe his face with.

Q. Did you wipe his face for him? A. Yes, sir.

Q. And you say you didn't call the Police; right? A. I didn't call 'em. I went to inform Mr. Ed Milligan, which he have a phone, and you can call free. * * *

* * * * *

120 Q. I see. So everything that the witnesses have said about you is wrong, isn't it? A. I wouldn't say everything. About my coming up there and everything, I wouldn't say that is but it is wrong about me hitting Woodrow.

Q. Did you kick Woodrow in the head with your foot? A. I did not.

Q. Are these your shoes? (Indicating Government's Exhibit No. 1 in evidence.) A. They is.

Q. Those are the shoes that you were wearing that day?

A. That's right.

Q. How do you account for the fact they they found blood on the shoes on the tips of the shoes?

MR. INGOLDSBY: I object to that.

THE COURT: I'll overrule the objection.

BY MR. COLLINS:

Q. How do you account for that fact?

121 MR. INGOLDSBY: Your Honor, there is no evidence that blood had been found on the shoes.

MR. COLLINS: All right, I will rephrase the question:

How does he account for the fact that a substance resembling blood was found on the shoes?

THE WITNESS: Well --

THE COURT: Well now wait a minute. I was writing something when the officer testified. This substance has not been identified as blood?

MR. INGOLDSBY: No, it has not, Your Honor.

MR. COLLINS: Just a substance resembling blood, Your Honor.

THE COURT: I will sustain the objection.

MR. COLLINS: All right.

BY MR. COLLINS:

Q. You were wearing these shoes, were you not? A. I was.

Q. And you were also wearing those pants, weren't you?

A. That's right.

* * * * *

123 Q. Are you the same Melvin Jackson that was convicted on August 14, 1953 of simple assault? A. I am.

124 * * * * *

125 Q. And are you the same Melvin Jackson that, on August 8, 1944, was convicted of robbery in Ohio? A. I wasn't convicted in Ohio.

Q. Were you convicted of robbery in 1944? A. I was convicted in robbery in Fort McClellan, Alabama as a soldier, United States Army of America.

* * * * *

REDIRECT EXAMINATION

BY MR. INGOLDSBY:

* * * * *

126 Q. Did you receive an Honorable Discharge from the Army?

A. Yes, sir.

* * * * *

127 THE COURT: Now I understand that the defendant rests.

MR. INGOLDSBY: Yes, Your Honor.

THE COURT: Any rebuttal?

MR. COLLINS: No, Your Honor, Government rests.

THE COURT: You may address the jury, Mr. Collins.

MR. COLLINS: Thank you, Your Honor.

(Counsel for the Government and counsel for the Defendant made their closing arguments whereupon the Court charged the jury as follows:)

128 JURY CHARGE

* * * * *

132 Now, as I have said, the defendant is charged in this case with second degree murder, and the indictment reads as follows:

133 "On or about November 17, 1962, within the District of Columbia, Melvin Jackson, with malice aforethought, murdered Samuel W. Agurs by beating him with his fists and kicking the said Samuel W. Agurs with his feet and by other means, a more exact description of which is unknown to the grand jury."

Murder in the second degree is the killing of one person by another with malice aforethought. Murder in the second degree may be committed with or without any purpose to kill if it is accompanied by malice as I will define malice to you.

The essential elements which the Government must prove beyond a reasonable doubt in order for you to find the defendant guilty of second degree murder are:

(1) That the defendant inflicted a wound, or wounds or an injury, or injuries, from which the deceased died; and (2) That the defendant acted with malice when he wounded the deceased.

As to the first point, before you may find the defendant guilty of homicide in any degree, you must find the Government has proved beyond a reasonable doubt that the decedent did in fact die from a wound or wounds resulting from a blow struck by the defendant.

Now, the definition of wound or wounds, as it applies in this case, includes injury or injuries resulting from a blow or blows struck by the

134 defendant. It is not essential that the skin be broken or even that there be an effusion of blood to constitute a wound within the definition of "wound" as I have given it to you. In this case injury is synonymous with wound.

Now, as to the second point: As I have said, murder in the second degree is the unlawful killing of one human being by another with malice but without deliberation or premeditation. If you have deliberation or

premeditation, it makes it first-degree, which we are not concerned with here.

Malice is an essential ingredient, or element, of murder in the second degree but premeditation or deliberation is not an essential element. Malice implies a condition of mind which prompts one to commit or direct an act wilfully. It is not limited in its meaning to hatred or ill will or malevolence but denotes a wicked and corrupt disregard of the lives and safety of others.

Malice, in the eyes of the law, is a state of mind which shows a heart fatally bent on mischief. A killing under the influence of passion induced by an insufficient provocation may be murder in the second degree. An accidental or unintentional killing constitutes murder in the second degree if the killing is accompanied by malice.

Malice as an essential element of the crime of murder in the second degree may be either express or implied. Express malice is pre-
135 sent when one with a deliberate mind and formed design kills another. Express malice does not necessarily mean malice expressed in words. The distinguishing feature of express malice is deliberation or formed design to take human life.

Implied malice is such as may be inferred from the circumstances of the killing; as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.

To repeat, the malice which is an essential element of the crime of murder in the second degree may be either express or implied, as I have defined those terms to you.

So, if you find that the Government has proved beyond a reasonable doubt that the defendant inflicted an injury, or injuries, from which the deceased died and the Government has proved beyond a reasonable doubt that the defendant acted with malice, either express or implied, then you may find the defendant guilty of murder in the second degree.

If you find that the Government has proved beyond a reasonable doubt that the defendant inflicted an injury, or injuries, from which the deceased died, but that the Government has failed to prove that the defendant acted with malice, either express or implied, as I have defined
136 those terms to you, when he injured the deceased, then you will consider whether or not the defendant is guilty of manslaughter.

Manslaughter is a lesser included offense to the crime of murder in the second degree. Manslaughter is the unlawful killing of a human being without malice.

For example: It may be such killing as happens on a sudden quarrel or in the commission of an unlawful act without deliberate intention of doing any mischief at all. If the killing is committed in the sudden heat of passion, caused by adequate and sufficientprovocation, the crime is manslaughter rather than murder in the second degree.

In order to reduce murder to manslaughter, the provocation must be such a degree as will cause an ordinary man to act on impulse and without reflection. In addition to great provocation, there must be passion and hot blood caused by that provocation. A trivial or slight provocation entirely disproportionate to the violence of the retaliation is not adequate provocation to reduce the crime from second degree murder to manslaughter.

If you find that the defendant inflicted injury or injuries to the deceased from which he died and that these injuries were inflicted in a sudden heat of passion and hot blood caused by an adequate provocation but without malice, bearing in mind the definition of malice that I have given you, you may find the defendant guilty of manslaughter; and, of
137 course, if you find that he didn't inflict injury or injuries which caused the death of the decedent, you would find the defendant not guilty.

Do either counsel have anything to suggest before I proceed to close?

MR. COLLINS: The Government is satisfied with the instruction, Your Honor.

MR. INGOLDSBY: We are.

THE COURT: Let the record indicate that Mr. Ingoldsby also shook his head in the affirmative that he had nothing to suggest.

* * * * *

139 (Thereupon, at 2:35 p.m., the jury retired to the jury room to deliberate, returning for further instruction at 3:20 p.m., the same day, whereupon the following proceedings were had:)

THE COURT: Mr. Nickels, I have your note as foreman, in which you say that the jury requests a copy of my charge, particularly that portion having to do with the distinction between second degree murder and manslaughter.

My charge is not written out in such form that it can be sent into the jury. Furthermore, although that is done in some jurisdictions, it is never done in this one, so I will repeat to you the elements of second degree murder and manslaughter and I will try to repeat them very slowly so that you will be sure and get it, and then when I finish that I will ask if there is anything else you want me to go over.

Now, murder in the second degree is the killing of one person by another with malice aforethought. Now, don't confuse malice aforethought with premeditation. They are not the same thing, and I will define malice a little later.

Murder in the second degree may be committed with or without any purpose to kill if it is accompanied by malice, as I will define malice for you.

The essential elements which the Government must prove beyond

140 a reasonable doubt in order for you to find the defendant guilty of second degree murder are:

(1) That the defendant inflicted a wound, or wounds from which the deceased died; and (2) That the defendant acted with malice when he wounded the deceased.

Now, as to the first point, do you want me to define what I mean by inflicted a wound or wounds, from which the deceased died?

FOREMAN: I don't think that will be necessary, Your Honor.

THE COURT: All right, then I will go into malice.

Now, as to the second point: As I have said, murder in the second degree is the unlawful killing of one human being by another with malice but without deliberation or premeditation.

Malice is an essential ingredient or element of murder in the second degree but premeditation or deliberation is not an essential element. Malice implies a condition of mind which prompts one to commit or direct an act wilfully. It is not limited in its meaning to hatred or ill will or malevolence but denotes a wicked and corrupt disregard of the lives and safety of others.

Malice, in the eyes of the law, is a state of mind which shows a heart fatally bent on mischief. A killing under the influence of passion induced by an insufficient provocation may be murder in the second degree. An accidental or unintentional killing constitutes murder in the
141 second degree if the killing is accompanied by malice.

I might give you an example of that which would not apply to the facts of this case but suppose somebody got in an automobile on a Saturday afternoon on F Street and ran down F Street at 60 miles an hour and ran over and killed somebody. That could be second degree murder and the disregard for human life could be to such an extent that it would constitute malice just as an example.

Malice as an essential element of the crime of murder in the second degree may be either express or implied. Express malice is present when one with a deliberate mind and formed intent kills another. Express malice does not necessarily mean malice expressed in words. The distinguishing feature of express malice is deliberation or formed design to take human life.

Now, implied malice is such as may be inferred from the circumstances of the killing; as for example, where the killing is caused by the intentional use of fatal force without circumstances serving to mitigate or justify the act, or when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and dis-

regard of human life, as in the example that I gave you of somebody coming down F Street at a high speed on a Saturday afternoon.

142 To repeat, the malice which is an essential element of the crime of murder in the second degree may be either express or implied, as I have defined those terms to you.

Now, as to manslaughter: If you find that the Government has proved beyond a reasonable doubt that the defendant inflicted an injury, or injuries, from which the deceased died but that the Government has failed to prove that the defendant acted with malice, either express or implied, as I have defined those terms to you, then you will consider whether the defendant is guilty of manslaughter.

Manslaughter is a lesser included offense to the crime of murder in the second degree. Manslaughter is the unlawful killing of a human being without malice, as I have defined it to you.

For example: It may be such killing as happens on a sudden quarrel or in the commission of an unlawful act without any deliberate intention of doing any mischief at all.

Now, you notice I didn't say without deliberate intention of doing any killing. I said without doing any mischief at all.

If the killing is committed in the sudden heat of passion, caused by adequate and sufficient provocation, the crime is manslaughter rather than murder in the second degree.

In order to reduce murder to manslaughter, the provocation must be of such a degree as will cause an ordinary man to act on impulse

143 and without reflection. In addition to great provocation, there must be passion and hot blood caused by the provocation. A trivial or slight provocation entirely disproportionate to the violence of the retaliation is not adequate provocation to reduce the crime from second degree murder to manslaughter.

If you find that the defendant inflicted injury or injuries to the deceased from which he died and that these injuries were inflicted in a sudden heat of passion and hot blood caused by an adequate provocation

but without malice, bearing in mind the definition of malice that I have given you, then you may find the defendant guilty of manslaughter.

* * * * *

[Filed March 26, 1963]

MOTION FOR JUDGMENT OF ACQUITTAL NON OBSTANTE VEREDICTO PURSUANT TO RULE - 29 - (A) OR MOTION FOR A NEW TRIAL PURSUANT TO RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

Comes now Melvin Jackson being first duly sworn on oath according to law depose and say that I am the defendant in this cause of Action and respectfully move this Most Honorable Court to enter a Judgment of Acquittal notwithstanding the verdict or to grant a new trial predicated upon the facts set forth in the Instant Motion as follows:

Defendant moves the court to enter a Judgment of Acquittal because the verdict was contrary to the weight of the evidence and defendant was not afforded a fair and impartial trial as guaranteed by the Sixth Amendment of the United States Constitution in that defendant did not enjoy the effective assistance of counsel.

ARGUMENT

I

The verdict was contrary to the weight of the evidence.

The verdict was contrary to the wieght of the evidence because the Government's witnesses testified differently from prior testimony which had been given at the coroner's inquest. Defendant requested his counsel to ask the Court to produce the Transcript of said witnesses prior testimony for Impeachment purposes. However the Court allowed the trial to continue and allowed a verdict to be returned on questionable testimony. The Court allowed further error by allowing the witnesses to testify after they openly admitted that they were under the influence of alcohol at the time of the alleged crime.

The burden of proof was on the Government to prove defendant guilty beyond a reasonable doubt. This burden was not met. See Schneiderman v. United States 320 U.S. 118, 158: The denial of use of the coroners transcript was plain error within the meaning of Rule - 52 (b) of the Federal Rules of Criminal Procedure and deserves the full attention of this Court. Anything less than the full protection of law, is a denial of due process of law. Davidson v. New Orleans 96 U.S. 91, 102 (1877) Hurtado v. California 110 U.S. 516, 531 (1884).

II

Defendant was denied a fair and impartial trial by the fact that he did not receive effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution.

Counsel appointed by the Court encouraged the defendant to tell a lie on the witness stand, and after defendant repised, counsel neglected to elicit any testimony from defendant which would have tended to carry defensive weight in the eyes of the jury. Said counsel only asked defendant his name and address and ended his questioning as the trial transcript will plainly show the Court again erred by allowing the Government to cross-examine outside the scope of direct testimony, which violates Rule 52 (b) of the criminal rules.

A showing of prejudice however is not required when a criminal defendant is asserting a Constitutional Right under the Sixth Amendment. United States v. Lustman, 258 F 2d 475, 478 (2nd Cir. 1958). There can be no question here for surely the jury was prejudiced by defendants attorney failure to establish the true defense of the case simply because the defendant would not tell a lie under oath.

It is the solemn duty of the Trial Judge to make sure that Representation of an accused by counsel is not an empty gesture but is the fulfillment of the spirit and purpose of the Constitutional Mandate. Gadsden v. United States, 96 U.S. App. D.C. 62 223 F. 2d 627: In this case the Honorable Court failed to take Judicial Notice of the actions by counsel for the defendant . (emphasis added). On the Issue of Ineffective

Assistance of counsel, though a layman, and in a delicate situation by these very distasteful circumstances, defendant is duty bound to himself to place the truth of the matter squarely and evenly before this Honorable Court. When a Court or an officer of the Court has knowledge requiring exercise of a duty on accused's behalf, failure to exercise such duty constitutes a denial of "due process of law" and violates the Fifth Amendment of the Constitution. Robinson v. Johnson, 50 E Supp. 774 (1943):

No conviction can stand no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel or any other element of due process of law without which he cannot be deprived of life or liberty. Coplon v. United States 89 U.S. App. D.C. 103, 114, 191, F. 2d. 749, 760 Cert. denied 342 U.S. 926 (1952).

CONCLUSION

Wherefore defendant prays that this most Honorable Court will grant a Judgment of Acquittal N. O. V. or a new trial, and such other relief as may be necessary.

Respectfully submitted in Good Faith.

/s/ Melvin Jackson

* * *

[JURAT - Dated - March 22, 1963]

[Filed March 29, 1963] DENIED - /s/ G. L. Hart, Jr.

[Filed April 11, 1963]

JUDGMENT AND COMMITMENT

On this 11th day of April, 1963 came the attorney for the government and the defendant appeared in person and by counsel, John L. Ingoldsby, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of SECOND DEGREE MURDER as charged and the court having asked the defendant whether

he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Ten (10) years to Thirty (30) years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ G. L. Hart, Jr.
United States District Judge.

[Filed April 17, 1963]

NOTICE OF APPEAL

Notice is hereby given on this 15 day of March 1963 that Melvin Jackson, the defendant in the above entitled criminal case desires to appeal from the conviction entered by this Court on March 12, 1963 in favor of the Government and against the defendant. The questions sought to be presented to the United States Court of Appeals for the District of Columbia Circuit are as follows:

1. The verdict was contrary to the weight of the evidence produced.

2. The Government did not establish Corpus Delecti or a prima facie case.

3. The Court erred in failure to produce the Coroner's transcript, which would've aided the defendant in impeaching the witnesses testimony.

4. The defendant was denied effective assistance of counsel as guaranteed by the Sixth Amendment.

5. The Coroner that testified at the trial was not the same individual that testified at the Coroner's Inquest.

6. The transcript of the coroner's preceeding shows that all Government witnesses were intoxicated at the alleged scene of the crime.

Respectfully submitted in Good Faith.

/s/ Melvin Jackson
200-19th Street S. E.
Washington 2, D. C.

[Certificate of Service]

[JURAT - Dated March 15, 1963]

Brief For Appellant

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,807

MELVIN JACKSON,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FORBES W. BLAIR
The Farragut Building
900 Seventeenth Street, N. W.
Washington, D. C., 20006
Attorney for Appellant
(Appointed by this Court)

No. 17,807

QUESTIONS PRESENTED

1. Whether the appellant was deprived of effective assistance of counsel.

2. Whether the trial court erred in permitting evidence of a crime other than the one for which appellant was charged.

3. Whether the trial court erred in disallowing cross-examination of a government witness concerning his background.

4. Whether the court erred in not instructing that the testimony of a key witness would have been adverse to the government, had the government not failed to produce her.

5. Whether a murder conviction should stand where appellant's acts may not have been the proximate cause of death.

6. Whether the trial court erred in permitting testimony by unqualified government witnesses regarding the presence of bloodstains on the clothing and shoes of the appellant.

7. Whether the instructions of the trial judge were misleading.

8. Whether there was sufficient evidence to support a conviction of second degree murder.

INDEX

TABLE OF CASES

OTHER REFERENCES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,807

MELVIN JACKSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Jurisdictional Statement

This is an appeal from a judgment of conviction and sentence in the United States District Court for the District of Columbia. This Court has jurisdiction under 28 U.S.C. 1291.

Statement of the Case

On November 21, 1962, the Coroner for the District of Columbia held an official inquest and heard testimony regarding the death of one Samuel W. Agurs . Among those giving testimony for the Government were Det. Alfred S. Hack, Viola Maples, and Delores Brown. Appellant made no statement

(J.A. 1, 2, and 3). Appellant was held for action by the Grand Jury.

On December 10, 1962, a one-count indictment was filed in the United States District Court for the District of Columbia charging appellant with second degree murder in violation of Title 22, Section 2403, of the District of Columbia Code. Specifically, the Grand Jury charged that appellant murdered one Samuel W. Agurs with malice aforethought "by beating him with his fists and kicking the said Samuel W. Agurs with his feet, and by other means" (J.A. 4). Appellant entered a plea of not guilty to the charge and after a trial by jury he was found guilty as charged. The Judgment and Commitment were filed on April 11, 1963, sentencing appellant to imprisonment for a period of ten to thirty years (J.A. 43, 44). From that judgment and sentence this appeal is taken.

A. G. Ellison, an unemployed worker who had been on welfare for three or four years, was called by the Government as its first witness (J.A. 5, 9). Mr. Ellison testified that on Saturday, November 17, 1962, appellant came to the house where Ellison and the deceased /Samuel "Woodrow" Agurs/ lived (J.A. 5). He testified that during appellant's second visit during that day, appellant asked him about someone taking his money and that appellant thereafter walked into the room of the deceased. Although Ellison claimed he "heard a blow or two" he testified unequivocally that he did not know what happened; that he "didn't see it"; and that he did not hear any conversation (J.A. 6). Ellison subsequently saw the deceased lying on the floor but he did not see the appellant at that time (J.A. 7). Ellison had not

previously seen the deceased on that particular day (J.A. 11). The trial court permitted the Government prosecutor to ask Mr. Ellison a line of questions concerning an alleged assault by appellant upon one Viola Maples (J.A. 7, 8). Ellison claimed appellant assaulted Miss Maples after coming out of the room of the deceased (J.A. 8). Upon cross-examination, it was learned that Ellison was a drinker of "smoke" and that the deceased had also been a "smoke" drinker (J.A. 9, 10).* Upon redirect the government prosecutor was permitted to ask Ellison of the whereabouts of witness Viola Maples and Ellison answered that he "heard" that she was in the hospital and that some unidentified person said that she had a broken leg (J.A. 10).

Albert Brown, was called as the Government's second witness and testified that he had seen the appellant on the day of the alleged offense at the house where Brown and the deceased resided. He stated that Viola Maples let appellant into the house and that appellant was complaining that someone had taken $18.00 from him (J.A. 11). The Court then permitted testimony concerning an alleged assault by appellant upon Viola Maples (J.A. 12). Brown testified the assault on Maples was before appellant went into the room of the deceased. Brown did not witness an altercation between appellant and the deceased, and his testimony concerning the alleged murder was limited to his hearing "the licks" (J.A. 12, 13). He did not hear appellant say anything during the time the appellant was actually in the room

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* "Smoke" was identified by Ellison as a type of alcohol (Tr. 21, 22).

with the deceased (J.A. 13). Brown testified further that the deceased and the appellant had been drinking and that when he went into the room of the deceased the latter was lying on the floor with his eyes open and blood on his face (J.A. 13). Appellant's trial attorney, upon learning from Brown that he worked for "Big Rose", asked Brown whether he worked for her selling whiskey in the alley in back of 6-1/2 N Street. The prosecutor objected to the question and the trial court sustained the objection (J.A. 13, 14).

Dr. Linwood L. Rayford, Jr. testified that he pronounced Samuel Agurs dead at the time he arrived on the scene, and that he performed an autopsy on November 18, 1962, the day following the alleged murder (J.A. 15). He testified that the death was from "asphyxia due to aspiration of blood and gastric content due to trauma about the face and head" (J.A. 16). He explained that the blood from the deceased's nose had blocked up the lungs (J.A. 16, 18). Dr. Rayford testified further that he performed an alcohol test on the body of the deceased and found that the deceased at the time of his demise had a blood level of alcohol high enough to render him almost helpless (J.A. 17). The condition of the deceased at that time was also described by Dr. Rayford as "just about" dead drunk (J.A. 17).

Upon cross-examination, Dr. Rayford admitted that the drunken condition of the deceased had a bearing on the latter's inability to dispose of the blood in his system. He testified that the normal response of the body of a sober person would be to "cough up" the blood. With regard to the deceased,

he testified that the combination of the trauma to his head and his drunken condition prevented the normal response (J.A. 18).

Delores Bernice Brown testified on behalf of the Government both during the coroner's inquest and at the trial. During her examination at the inquest she stated that on the day in question she came out of the kitchen and saw the appellant "beating on Woodrow /deceased/, kicking him". She testified that she thereafter went back into the kitchen where she continued to "hear the licks" (J.A. 2, 3). During her examination at the trial, however, she indicated at one point that she witnessed the entire altercation, from the time the appellant went into the room of the deceased to the time he came out (J.A. 20). When asked about hearing "licks passed" she testified that "the only licks that I heard passed was when -- with Viola, with Viola Maples, but I didn't see it, but I heard the licks passed with her" (J.A. 20). She testified that both appellant and the deceased had been drinking (J.A. 3, 20).

Edward Milligan testified that he saw the appellant on November 17, 1962, at 614 N Street, Northwest, and that he ordered appellant and four or five others to leave the premises. He stated that later the same day appellant came to his residence and informed him that someone had taken a sum of money from him and mentioned that the deceased had been beaten. Milligan testified that he advised appellant to call the police and then "went on back upstairs" (J.A. 21).

Warren L. Copeland, a Private with the District of Columbia Police Department, testified that he was the arresting officer. The Court permitted

Pvt. Copeland to testify that the appellant's trousers and shoes had blood-stains on them (J.A. 22).

Det. Alfred S. Hack testified both during the coroner's inquest and at the trial. During the inquest he testified that the appellant "made no statement whatsoever" (J.A. 2, 3), but during the trial Det. Hack testified that appellant denied any knowledge of the death and "told several stories" (J.A. 23). At the trial Det. Hack, without first being qualified, was permitted to testify as to stains on the clothing and shoes of the appellant, "having the appearance of blood" (J.A. 24). The "stained" shoes and trousers were admitted into evidence (J.A. 25).

At this point in the proceeding the Government rested and appellant's counsel moved for a judgment of acquittal, which was summarily denied (J.A. 25).

Melvin Jackson, the appellant herein, testified on his own behalf. He testified that prior to his arrest he was a carpenter's helper and janitor for a Washington real estate company. On Saturday, November 17, 1962, the day in question, he was coming from 6-1/2 N Street when he was called by Viola Maples to repair a stove that was in the room of A. G. Ellison. Thereafter he was talking with Mr. Ellison, Viola Maples, and the deceased when the latter asked him for money. Appellant testified that he gave the deceased 45 cents and that the deceased left and subsequently returned with a fifth of whiskey. Appellant testified that while the others drank he went to sleep on Ellison's bed. When he awakened he saw Edward Milligan, who

was talking to A. G. Ellison about the stove. Appellant testified further that he received some money from Milligan to buy some "stop leak" to repair the stove. Appellant testified that he thereafter left the premises and when he was searching for his keys he discovered that his money was gone (J.A. 26, 27, 28).

Appellant testified further that he returned to Ellison's room and asked the latter whether he had seen anyone take his money. Appellant stated he confronted Viola Maples with the same question. Ellison claimed he had "dropped off to sleep" and Viola Maples denied knowing anything about the money. Appellant stated that he then learned that the deceased was in his room and that the deceased was ill (J.A. 29). Appellant described the events that followed as follows (J.A. 29, 30):

> "He wasn't standing at the foot of the bed but he was standing right up from the foot of the bed. He wasn't standing at the foot of the bed. So, and I told him, I said, 'Man, don't complain like that,' I said, 'Come on, tell me about my money,' just like that. He didn't say nothing but he was catching his breath hard, had his head down, and so I asked him again, I said 'Woodrow,' I said 'Do you know who got my money?' He said 'I tell you, you find your money yourself. I'm sick,' and he turned from me. He went to turn back toward the bed, turning from me toward the bed, and then he fell; and I stood there for a few minutes thinking that it was just a drunk fall, and he was drunk, and he didn't get up; so I picked him up, stood him up and turned him around to me and turned him around, and I seen he had blood on his face.
>
> "I then turned and set him down on the bed on the side of the bed, which bed the mattresses was turned acrossways of the bed, the top mattresses were. I set him on the foot or pretty close to the foot of the other box mattress -- I call it a box mattress, and I called A. G. Ellison, I said, 'A. G.', I said, 'Do you have a rag?' He say 'I'm in the bed. I can't get up,' just like that; and so I asked Woodrow, said 'Can you set here until I get a rag out of A.G.'s room?' and he said -- shook his head yes, didn't say nothing, shook

his head and -- yes -- and I turned him loose. I left him there and went in A. G.'s room to get a rag and I come back, he had done tumbled over the bed, what I mean, tumbled, fell over off the bed on his knees, and his head against the wall, which the door, which the sliding door wasn't open against the wall, which the -- against the wall, which the sliding door was, which wasn't open. The door which wasn't -- part of the sliding door wasn't open. His head was against that.

"Then I pulled him away from that wall about, approximately six or seven inches and shoved the door back, shoved this side of the door back where I could see him, and picked his head up and washed his face and lays his hand on his head. Then I turned and throwed the rag in A. G.'s room in the trash.

"Come back to A. G, said 'Woodrow is hurt bad.' He said 'How bad?' I said 'I don't know but he bled at the nose and at the mouth,' and I said 'I'm going and call, tell Mr. Ed Milligan downstairs call the ambulance,' just like that; and I left the room.

"Then I goes down the stairs and out."

Immediately following the closing arguments the trial court charged the jury. The instructions included a lengthy definition of murder in the second degree (J.A. 35, 36, 37), and a brief definition of manslaughter (J.A. 37). The jury retired to the jury room for less than an hour when it sent out a note by its foreman requesting a copy of the court's charge,"particularly that portion having to do with the distinction between second degree murder and manslaughter." The trial court stated that his charge was not written in such form as to send it into the jury and he stated further that "it was never done" in this jurisdiction (J.A. 38). The Court did, however, repeat the elements of second degree murder and manslaughter. To further illustrate the difference between the two crimes the trial court cited an example. After stating that "an accidental or unintentional killing constitutes murder

in the second degree if the killing is accompanied by malice," the following example was given:

> "I might give you an example of that which would not apply to the facts of this case but suppose somebody got in an automobile on a Saturday afternoon on F Street and ran down F Street at 60 miles an hour and ran over and killed somebody. That could be second degree murder and the disregard for human life could be to such an extent that it would constitute malice just as an example."

Upon further deliberation the jury found appellant guilty of second degree murder.

On March 26, 1963, appellant filed pro se a "Motion For Judgment of Acquittal Non Obstant e Veredicto Pursuant to Rule 29(a) or Motion For a New Trial Pursuant to Rule 33 of the Federal Rules of Criminal Procedure" wherein appellant argued, inter alia, that the testimony of the Government's witnesses during the trial at the District Court was different from the prior testimony given by them at the coroner's inquest. Appellant stated in the motion (which was notarized) that he had requested his appointed counsel to ask the trial court to produce the coroner's transcript for impeachment purposes, and that the trial court allowed the trial to continue. He argued therein that the denial of the use of the coroner's transcript was plain error within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. The motions were denied by the Trial Court (J.A. 41, 42, 43).

A Notice of Appeal to this Court was filed by appellant on April 17, 1963 (J.A. 45).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2403, provides:

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree.

Title 22, District of Columbia Code, Section 2405, provides:

Whoever commits manslaughter shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding fifteen years, or by both such fine and imprisonment.

STATEMENT OF POINTS

1. The appellant was deprived of effective assistance of counsel.

2. The trial court erred in permitting evidence of a crime other than the one for which appellant was charged.

3. The trial court erred in disallowing cross-examination of a government witness concerning his background.

4. The court erred in not instructing that the testimony of a key witness would have been adverse to the government, had the government not failed to produce her.

5. A murder conviction should not stand where appellant's acts may not have been the proximate cause of death.

6. The trial court erred in permitting testimony by unqualified government witnesses regarding the presence of bloodstains on the clothing and shoes of the appellant.

7. The instructions of the trial judge were misleading.

8. There was not sufficient evidence to support a conviction of second degree murder.

SUMMARY OF ARGUMENT

I

Appellant was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the Federal Constitution when his court-appointed trial counsel refused or neglected to use the coroner's transcript to impeach the testimony of the government witnesses.

II

It was reversible error for the trial court to have permitted the admission of evidence of an offense other than the one with which appellant was charged. The evidence admitted during the murder trial that appellant assaulted a third person was more prejudicial than probative.

III

The trial court erred in refusing to permit appellant's trial counsel to cross-examine a government witness concerning his background. Prejudice ensued from the denial of an opportunity to place the government witness in his proper setting in order that the jury could fairly appraise his testimony.

IV

The failure of the government to call a material witness, whose absence was not satisfactorily explained, justified a presumption that the witness would have testified adversely to the government had she been produced. The trial court erred in not instructing the jury on this point.

V

Appellant's conviction for second degree murder should not stand in

light of the fact that it is questionable whether his acts were the proximate cause of death involved. The evidence indicated that the drunken condition of the deceased was a primary and intervening cause of his demise.

VI

The trial court erred in permitting police officers to render an opinion as to whether the stains on the appellant's apparel were blood. Neither officer had the background or experience necessary to qualify them to so testify.

VII

The crucial issue in the minds of the jurors was whether the appellant was guilty of second degree murder or manslaughter. The trial court's example of second degree murder was misleading and amounted to reversible error.

VIII

Even when the evidence is reviewed in a light most favorable to the government there is not sufficient evidence indicating malice in the legal sense to support a conviction of second degree murder.

ARGUMENT

I

The Appellant Was Deprived Of Effective Assistance Of Counsel

Courts are bound to protect members of the Bar appearing before them against unjust and unwarranted attacks and mere allegations of incompetence or inefficiency of an accused's trial counsel are understandably not sufficient to justify vacating a judgment of conviction. In this instant appeal there is no claim that appellant's court-appointed trial counsel was or is other than an experienced and distinguished member of the District of Columbia Bar.* The point to be considered here is not of a general nature but is narrowed to the issue of whether appellant was denied effective assistance of counsel when his trial counsel refused or neglected to obtain and use the coroner's transcript to impeach the testimony of the government witnesses. The transcript of the proceedings before the Coroner was available to trial counsel for such purposes, ** or if it was not readily available, counsel could have made the proper motion to have it made available for such purposes. The failure of the trial counsel to obtain and use the transcript for impeachment purposes after being requested to by the appellant was more than a mere mistake of judgment or an error in trial tactics, it amounted to a substandard level of

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* Appellant's trial counsel is a former United States Attorney for the District of Columbia who has been actively engaged in practice in the District of Columbia for the past 17 years.

** This Court is asked to take notice of the fact that the Assistant U. S. Attorney prosecuting homicide cases ordinarily has the coroner's transcript which may be inspected and used by defense counsel. In the instant case the transcript was apparently not available as the appellants' present counsel had to file a motion to have it prepared and made available.

service which dictates a conclusion that the representation of appellant was inadequate.

The case of Johnson v. United States, 110 F.2d 562; 71 U.S. App. D.C. 400 (1940) appears to be on all fours with the instant case. In the Johnson case the defendant had been convicted of murder and the court-appointed attorneys did not examine the transcript of testimony taken at the coroner's inquest. After the trial the defendant moved for a new trial on the ground that the testimony at the inquest amounted to newly discovered evidence. The trial court found that the testimony given at the inquest supported the Government's evidence presented at the trial. This Court, in reversing the decision of the trial court, stated as follows:

> "The experienced counselor who represents appellant here did not represent him at the trial. Accused was a colored boy without funds or other means to employ counsel of his own selection, and the court appointed two attorneys to defend him. The defense was conducted by one of them and another member of the bar. These attorneys did not examine the transcript of the testimony taken at the inquest. After the trial, they filed no brief in this court within the time allowed by the rules. The trial court finally asked present counsel to represent the defendant on this appeal. In the circumstances the failure of counsel to produce all available evidence, in a case involving the life of the accused, should not be held against him. It would be a strange system of law which first assigned inexperienced or negligent counsel in a capital case and then made counsel's neglect a ground for refusing a new trial. The right to counsel is not formal, but substantial."

In the instant case, had trial counsel taken the time and effort to obtain a copy of the coroner's transcript,he would have learned that the only eye-witness to the alleged murder testified differently at the trial than she did at the coroner's inquest. For example, during the coroner's proceeding Delores

Brown testified that she did not witness the entire altercation for at some point she returned to the kitchen. During the trial, however, Mrs. Brown indicated that she witnessed the entire incident. Obviously, the two accounts given by the Government's star witness are inconsistent and both could not be true. Had the coroner's transcript been available, trial counsel would have had a firm basis for cross-examining this witness upon whom the Government rested so heavily. Had Mrs. Brown been skillfully cross-examined on the point as to what she actually saw, the jury may well have discounted her story as not being trustworthy. Without her testimony the Government's case would have virtually collapsed.

Another of the Government's principal witnesses, Det. Alfred S. Hack, testified both during the Coroner's inquest and at the trial. Had the trial attorney obtained a copy of the Coroner's transcript he would have learned that, like Mrs. Brown, the testimony of Det. Hack at the two forums varied substantially and significantly. Hack testified at the inquest that appellant "made no statement whatsoever" yet at the trial he prejudiced appellant by stating that the latter "told several stories" with respect to the alleged crime. Had this information regarding Det. Hack's prior testimony been available, the appellant's trial counsel could have effectively cross-examined the police officer regarding his damaging testimony and a different result may well have been effectuated. As it was, the testimony of the unimpeached police detective stood as the unvarnished truth.

In light of the law in the Johnson case, supra, and in view of the fact

situation as it exists in the instant case, it is clear that appellant was denied effective assistance of counsel as guaranteed by the Sixth Amendment of the Federal Constitution. Consequently, reversible error exists.

II

The Trial Court Erred In Permitting Evidence Of A Crime Other Than The One For Which Appellant Was Charged

This Court has time and again recognized the well-settled rule that it is ordinarily reversible error for the trial court to admit evidence of an offense other than the one on trial. Burge v. United States, 26 App. D.C. 524 (1906); Martin v. United States, 127 F.2d 865 (C.A. D.C. 1942); Hansford v. United States, 303 F.2d 219 (C.A. D.C. 1962); Harper v. United States, 99 U. S. App. D.C. 324, 239 F.2d 945 (1956); Fairbanks v. United States, 226 F.2d 251, 96 U.S. App. D.C. 345 (1955).

In the Burge case, supra, this Court followed the general rule by reversing the conviction of a defendant for having killed his wife at 12:00 o'clock because of the introduction of evidence by the Government that he had also shot his mother-in-law at 12:30. This Court said:

> "The government cannot prove against a defendant any crime not alleged, in aid of the proof that he is guilty of a crime charged. Whatever tends directly to prove a defendant guilty of the crime charged, though guilty also of another, may be shown against him; but his cause cannot be prejudiced by the evidence disclosing irrevelant guilt. Even where offenses are of a like sort, evidence to prove one is not ordinarily admissible to prove another. If one be indicted for the murder of a particular person it is not admissible to prove that at another time he murdered, or attempted to murder, another person. Mr. Bishop says: 'To permit such evidence would be to put a man's whole life in issue on the charge of a single wrongful act, and crush him by irrelevant matter which he could not be prepared to meet.' Bishop, New Crime, Proc. secs. 1120-1124."

This Court and other Federal jurisdiction recognize a number of exceptions to the general rule,* but the factual situation in the instant case does not fall within the recognized exceptions. The sole purpose of the Government's testimony was apparently to show a mere propensity or disposition on the part of appellant to commit crime. To admit it on that basis was in error. United States v. Lawrelli, 293 F.2d 830 (C.A. Pa. 1961). In Harper v. United States, supra, this Court stated that "evidence tending to prove merely criminal disposition is excluded because of the likelihood that it would weigh too heavily with the jury."

During the trial in the instant case an abundance of evidence was admitted concerning the assault upon the person of one Viola Maples by the appellant. A. G. Ellison testified appellant "slapped Viola". Albert Brown also testified that appellant "slapped" and "beat" Miss Maples. Delores Brown stated that she had heard appellant assaulting Miss Maples. Consequently, evidence of another crime was wrongfully permitted. The word "crime" as used in connection with evidence of crimes independent of that charged, includes misdemeanors such as assault. Pyle v. United States, 156 F.2d 852, 81 U.S. App. D.C. 209 (1946).

The evidence that appellant assaulted Viola Maples was more prejudicial than probative and its admission was error. The evidence was not significantly relevant to the offense charged. It tended to prove that appellant was a "bad guy" and the jury may well have leaped from the fact of commission of an assault on a woman to the conclusion of the commission of the murder. The fact, if it was a fact, that appellant had assaulted a woman on the same day as the alleged homicide,

*In the Fairbanks case, supra, 226 F.2d at 253, this Court stated that "the exceptions to the rule are so numerous that it has been said that it is difficult to determine which is the more extensive, the doctrine or the acknowledged exceptions.'"

threw no light whatever on the question as to whether he was guilty of murder. See Lovely v. United States, 169 F.2d 386 (4th Cir. 1948).

This Court should follow the general rule and find that it was reversible error for the trial court to have permitted the admission of evidence of another offense. Counsel for appellant at the trial stage did not object to the admission of such evidence, but its admission was plain error affecting substantial rights. Rule 52(b), Federal Rules of Criminal Procedure.

III

The Trial Court Erred In Disallowing Cross-Examination Of A Government Witness Concerning His Background

Cross-examination is a matter of right and it may be used as a means to probe a witness's background in the community wherein he resides and works so that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment. Alford v. United States, 282 U.S. 687 (1931). Facts may be brought out upon cross-examination to discredit a witness by showing that his testimony was biased. For the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, if such has a tendency to show his lack of honesty. Alford v. United States, supra; Simon v. United States, 123 F.2d 80 (4th Cir. 1941); United States v. Masino, 275 F.2d 129 (2nd Cir. 1959); United States v. Lester, 248 F.2d 329 (2nd Cir. 1957).

In the Alford case, supra, the government in a mail fraud case called a witness who gave damaging testimony with respect to various transactions

of the accused. Upon cross-examination questions seeking to elicit the witness's place of residence were excluded on the government's objection that they were inmaterial and not proper cross-examination. Counsel for defense insisted that the questions were proper cross-examination, and that the jury was entitled to know "who the witness is, where he lives and what his business is." After the jury was excused, defense counsel also revealed that the witness was in the custody of federal authorities and that such fact might be brought out for showing bias and prejudice. The trial court disallowed cross-examination on the point saying that only felony convictions could be shown. The Court of Appeals upheld the trial court. The Supreme Court reversed, stating, in pertinent part (282 U.S. at 692):

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply (citing cases). It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them (citing cases). To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

In the present case, defense counsel had established that Albert Brown, a government witness, worked for a certain individual. The next question was "And do you work for her selling whiskey in the alley -- in the back of 6-1/2 N Street". The Government prosecutor objected and the trial court sustained

the objection indicating that he would only permit defense counsel to show convictions (J.A. 13, 14). Defense counsel stated he was "trying to show the nature of witness's employment" (J.A. 14). The question was an essential step in identifying the witness with his environment, to which cross-examination may always be directed, Alfred v. United States, supra, at p. 693 (and cases cited therein).

The evidence, if permitted, may have shown witness Albert Brown to be a bootlegger who may have been anxious to cooperate with the Government in the murder prosecution so as not to invite prosecution of himself as a law violator. Mr. Brown did not present himself as a disinterested person, but he may well have been the source of the "smoke" and the whiskey that played such a major part in the incident involved.*

The purpose of the cross-examination was not merely to discredit the witness by showing him to be a bootlegger as the trial court may have thought, but it was to show by such facts as proper cross-examination might develop, that Brown's testimony may have been biased.

Only further cross-examination would have revealed the extent of his interest or his motive in testifying against appellant.

The extent of cross-examination is within the sound discretion of the trial court but here the defense counsel did not even get an opportunity to open the door. The question as to whether the subject was exhausted is not before

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* The appellant testified that on the day in question he was "coming from 6-1/2 Street to N Street" which appears to be the same location involved in the question to Brown (J.A. 26).

this Court. The trial court is under no obligation to protect a witness from being discredited or embarrassed. The trial in the instant case cut off in limine all inquiry on a subject to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudical error. Alford v. United States, supra.

IV

The Court Erred In Not Instructing That The Testimony Of A Key Witness Would Have Been Adverse To The Government, Had The Government Not Failed To Produce Her

A witness who is available to the prosecution to maintain its burden of proof, but who it does not produce or satisfactorily explain why it cannot, is presumed to be one who would testify against the government. Yaw v. United States, 228 F.2d 382 (9th Cir. 1955); Schumacher v. United States, 216 F.2d 780, (8th Cir. 1954); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955). This Court has stated that the absence of such a witness must be sufficiently accounted for or explained. Billeci v. United States, 184 F.2d 394, 87 App. D. C. 274 (1950). And where, as in the instant case, the failure of the government to call a witness who could to some extent have contradicted defendant's testimony, if it were untrue, justifies an inference that her testimony would have been against the government. Wesson v. U.S. 172 F.2d 931 (C.A. Ark. 1949).

There is an additional rule that no inference can be drawn against a party for failure to call a witness if the witness is equally available to both parties but it does not apply where there is a likelihood of bias on part of the

person not called as a witness. U.S. v. Beekman, 155 F.2d 580 (2nd Cir. 1946). The question of equal availability of a witness is largely a question of fact to be determined from such circumstances, as his relationship to one or other of the parties and the nature of testimony that he might be expected to give in light of his previous statements about facts of the case. Availability is not to be determined from his accessibility for service of subpoena upon him. McClanahan v. United States, 230 F.2d 919 (5th Cir. 1956) cert denied 352 U.S. 824.

The missing witness in the instant case was Viola Maples. She testified at length during the coroner's inquest (Coroner's transcript 12-19). During the trial no less than three of the Government's witnesses placed her at the scene of the alleged crime. According to the Governments case, Miss Maples was the victim of an assault by appellant on the same day as the alleged murder. Appellant himself testified that she was in the house where the incident occurred but he denied hitting her. If produced, Miss Maples would apparently have been a key witness, yet the Government chose to proceed with the prosecution without her.

The issue as to this missing witness reduces itself to the question as to whether the Government sufficiently accounted for or satisfactorily explained her absence. It is respectfully submitted that the question must be answered in the negative. The only explanation was given by A. G. Ellsion during his testimony upon redirect as follows (J.A. 10).

"By Mr. Collins:

Q. Now, this Viola Maples that you mention; do you know where she

is today?

A. She is in the hospital, I heard.

Q. Do you know why she is in the hospital?

A. Say that she got a leg broke."

That is all the "evidence" the Government produced to explain the absence of Miss Maples. Ellison's statement is purely hearsay as he was only relating what he had heard. The Government did not produce a witness with actual knowledge of the reasons for the absence of Miss Maples, nor did it tender hospital records. It relied on the hearsay statements of an unemployed welfare worker whose past time includes drinking of "smoke". Consequently, the Government failed to meet its burden and the presumption remained that the testimony of Viola Maples would have been adverse to the Government. The failure of the trial court to instruct the jury regarding the "missing witness" was plain error affecting substantial rights. Rule 52(b), Federal Rules of Criminal Procedure. Bartley v. United States (No. 17,592, U.S. App. D.C., decided May 29, 1963).

V

A Murder Conviction Should Not Stand Where Appellant's Acts May Not Have Been The Proximate Cause Of Death

To warrant a conviction for homicide, the death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which the accused does not participate. If it appears that the act of the appellant was not the prominent cause of the death for which he is being prosecuted, but that another cause intervened, with which he was in no

way connected, and but for which death would not have occurred, such supervening cause is a good defense to the charge of homicide. (See 26 Am. Jur., Homicide, §50 and cases cited therein).

In the instant case the physician who performed the autopsy testified that the death involved was from "asphyxia due to aspiration of blood and gastric content due to trauma about the face and head". He explained that the blood from the deceased's nose had blocked up the lungs. The condition of the deceased was described as "just about" dead drunk as his blood level of alcohol was high enough to render him almost helpless. The physician admitted that the drunken condition of the deceased had a bearing on the latter's inability to dispose of the blood in his system. He testified that the normal response of the body of a sober person would be to "cough up" the blood. The combination of the trauma to the head of the deceased and his drunken condition apparently prevented the normal response.

Assuming, arguendo, that appellant was responsible for the injury, the intervening cause of the death was the inability of the deceased to cough up the blood to prevent asphyxiation. Had the deceased not been stone drunk he would probably be alive today. His drunken condition, more than anything, was the real cause of his death. At least it raises a reasonable doubt whether the act of the appellant was the proximate cause. Appellant is facing a ten to thirty year sentence for this offense. Any substantial doubt should be resolved in his favor.

VI

The Trial Court Erred In Permitting Testimony By Unqualified Government Witnesses Regarding The Presence Of Bloodstains On The Clothing And Shoes Of The Appellant

Warren Copeland, a precinct private with only two years of experience on the police force (Tr. 73), was allowed to testify that the appellant's trousers and shoes had bloodstains on them. Similarly, Det. Alfred Hack was allowed to testify as to stains on the clothing and shoes of the appellant, "having the appearance of blood". This was highly prejudicial to the rights of appellant and was clearly error.

While it may not always be necessary to identify blood or bloodstains by chemical analyses, it is definitely necessary where, as here, there was not a large quantity of the substance in question, and where, as here, the persons that sought to identify the substance were not held out to be experienced in the field. In other words, it would be one thing for an experienced officer from the Accident Investigating Unit (AIU) to testify to finding a pool of blood on a roadside near where a body was found, but it is quite another for an inexperienced officer to testify in a murder prosecution that in his opinion the stains on a pair of shoes or trousers were blood.

The difference between a "fact" and an "opinion" is one of the fundamental differences in the law of evidence. A fact can be testified to by any witness but an opinion can usually be given in evidence only by an expert, and the qualifications as an expert and reasons for his opinion are part of the premise for allowing him to testify.. Lyles v. United States, 254 F.2d 725, 731 cert

denied 356 U.S. 961 (1957). In the instant case the officers were at liberty to testify to the fact that there were red stains on appellant's shoes and trousers but it was plain error to permit them to testify as to their opinion that the stains were blood or "resembled blood".

VII

The Instructions Of The Trial Judge Were Misleading

The crucial issue in the minds of the jurors was apparently whether appellant was guilty of manslaughter or second degree murder. After receiving a lengthy but not necessarily clear instruction, the jury requested a copy of the trial court's charge "particularly that portion having to do with the distinction between second degree murder and manslaughter" (J.A. 38). Thereafter, the trial court endeavored to explain the distinction by way of example of what constitutes murder in the second degree:

> "I might give you an example of that which would not apply to the facts of this case but suppose somebody got in an automobile on a Saturday afternoon on F Street and ran down F Street at 60 miles an hour and ran over and killed somebody. That could be second degree murder and the disregard for human life could be to such an extent that it would constitute malice just as an example."

This example given by the trial judge was misleading. The assumed fact situation given by the judge amounted to an example of manslaughter (Title 22, Section 2405 of the D. C. Code) or negligent homicide (Title 40, Section 606 of the D. C. Code), but without additional facts, not second degree murder (Title 22, Section 2403 of the D. C. Code). Cf. Nestlerode v. United States, 122 F.2d 56 (C.A. D.C. 1941).

When the jury considered and compared this graphic example given by the trial court with the government's version of appellant's actions, they were obviously misled into thinking that second degree murder could be unwittingly and easily committed. The jury may well have reasoned that if one could be convicted of second degree murder by causing a death driving a car at a high rate of speed down a busy avenue, then certainly causing a death by physically assaulting a fellow human being must be at least as serious.

The misleading example given by the trial judge involved the crucial issue and amounted to reversible error. The defect in the instructions was not called to the attention of the trial court at any stage of the proceedings but it is the well settled duty of an appellate court to correct such prejudicial error, particularly in a murder case, even though not pointed out in the trial court. McDonald v. United States, 284 F.2d 232 (C.A. D.C. 1960).

VIII

There Was Not Sufficient Evidence To Support A Conviction Of Second Degree Murder

Appellant emphatically denies committing the crime charged (J.A. 26-34), and if he is guilty of any crime it is not murder in the second degree. The essential element which the government failed to prove was malice afbre-thought. Malice denotes a vicious and wicked state of mind. It is often described as a state of mind which shows a heart fatally bent on mischief.

Even if the evidence is reviewed in a light most favorable to the Government, there is not sufficient evidence indicating malice in the legal

sense. The prosecution's case pictured appellant as being provoked by a robbery in which he was deprived of his money. It indicated further that all parties, including appellant and the deceased (who had known each other on friendly terms for 15 years) had been drinking to excess. Appellant, according to the Government's case, became outraged over the claimed robbery and assaulted the deceased by "stomping" on him. There was no evidence of a weapon other than the shod foot. There was no evidence as what, if anything, was said during the alleged altercation. There was no evidence that appellant wilfully killed the deceased. In short, there was insufficient evidence to apply the doctrine of "implied malice".

In United States v. Hamilton, 182 F. Supp 548 (D.C. D.C. 1960), the facts were somewhat similar to those presented by the government in the instant case. In that case the defendant after an argument, knocked down the deceased and while the latter was lying on the ground the defendant there apparently exploded in a fit of ungovernable rage and jumped on the face of the deceased and kicked him in the head as well. The injuries to the deceased were substantial. The defendant was charged with second degree murder. The Court in the Hamilton case found that "there was no malice in this case in the legal sense. Moreover, any reasonable doubt as to the nature and degree of homicide should enure to the defendant's benefit." The Court there found the defendant guilty of manslaughter.

Appellant has been convicted of second degree murder and sentenced to serve from ten to thirty years in the penitentiary. It is respectfully submitted that in the absence of malice in the legal sense, there is insufficient evidence to support his conviction.

CONCLUSION

WHEREFORE, appellant respectfully prays that the judgment of conviction be reserved, and that the case be remanded with directions to enter a judgment of acquittal.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17807

MELVIN JACKSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
WILLIAM H. COLLINS, Jr.,
JOHN A. TERRY,
Assistant United States Attorneys.

QUESTIONS PRESENTED

1. Were the blows to the decedent's head, inflicted by appellant, the proximate cause of death when the Deputy Coroner testified that death was caused by congestion of the lungs by blood emanating from the decedent's head injuries?

2. Was appellant deprived of effective assistance of counsel because his attorney did not obtain a transcript of the coroner's inquest, when there is nothing in the record to show that appellant requested that he obtain it except for an allegation contained in a *pro se* motion for judgment of acquittal n.o.v., and when seeming inconsistencies between the coroner's transcript and evidence at trial can be readily explained?

3. Did the trial court abuse its discretion in cutting off cross-examination of a witness as to certain possibly illegal activities unrelated to the issues in the case, especially when appellant's counsel made no proffer of proof that the witness actually engaged in such activities?

4. Did the trial court commit "plain error" within the meaning of Rule 52(b), Federal Rules of Criminal Procedure:

(a) By allowing testimony as to an attack on another person present at the scene of the crime, when this attack was virtually simultaneous with the murder and was part of one continuing sequence of events?

(b) By allowing testimony as to the presence of stains from a "substance resembling blood" on appellant's clothing, when in fact the court sustained an objection by appellant's counsel, who pointed out that the substance had not been identified as blood?

(c) By not giving the jury a missing witness instruction, when there is nothing in the record to show that such an instruction was ever requested and when in fact the absence of the witness was satisfactorily explained by another witness?

5. Did the trial court correctly instruct the jury on the difference between second-degree murder and manslaughter?

6. Was the evidence sufficient to support a conviction of second-degree murder?

INDEX

TABLE OF CASES

*Cases or authorities chiefly relied upon are marked by asterisks.

OTHER REFERENCES

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an indictment filed on December 10, 1962 (J.A. 4), Melvin Jackson was charged with murder in the second degree in violation of 22 D.C. Code § 2403. He was tried by a jury before Judge Hart of the District Court on March 11 and 12, 1963. The jury found him guilty, and by judgment and commitment filed April 11, 1963 (J.A. 43–44), he was sentenced to be imprisoned for a term of ten to thirty years. From that judgment he appeals.

Cause of Death

The evidence at trial showed that the decedent, Samuel Woodrow Agurs, met his death in the late afternoon of November 17, 1962 (Tr. 44–45). Dr. Linwood L. Rayford, Jr., Deputy Coroner for the District of Columbia, who performed an autopsy on the decedent, testified that death was caused by "asphyxia due to aspiration of blood and gastric content due to

trauma about the face and head" (J.A. 16). "There were contusions and abrasions about the chin, left cheek, and around the right eye" visible on external examination, as well as lacerations of the left eyelid and lower lip; the decedent's nose was fractured and slightly displaced, and there was blood on the nose (J.A. 16). Dr. Rayford went on to explain that as a "result of fairly extensive beating about the head and fractured nose, blood escaped from the nose" and from the lacerated lip and found its way into the decedent's lungs, where it clogged the lungs and caused his death (J.A. 16–18). In Dr. Rayford's opinion, the blows to the head suffered by the decedent were the proximate cause of death (J.A. 17).

Dr. Rayford further testified that he had performed a blood alcohol test on the decedent and had found an alcohol content of 0.37 percent. This was sufficient, according to the doctor, to render Agurs at the time of his death "almost comatose," not quite "dead drunk" but "right on the borderline" (J.A. 17). On cross-examination Dr. Rayford testified that this state of intoxication "could have had some bearing" on the decedent's inability to dispose of the blood normally rather than breathing it into his lungs, in that the normal response of a sober person would have been to cough such foreign material up out of the lungs. In Agurs' case, however, as a result of "the combination of the trauma to his head and probably his drunken condition as well," his coughing mechanism did not function normally so as to dispose of the aspirated blood (J.A. 18).

Evidence for the Government

The decedent lived and died at 614 N Street, N.W. Several other occupants of these premises appeared as Government witnesses at the trial to testify as to the events surrounding Agurs' death. According to these witnesses—A. G. Ellison, Albert Brown and Delores Brown—the sequence of events was as follows:

Appellant had come to the premises at 614 N Street, a second-floor flat over a store divided into rooms or apartments where several individuals lived (Tr. 23–24, 28, 88–89, Coroner's Tr.* 9), early in the afternoon of November 17 (J.A. 5, Tr.

* Herein referred to as Cor. Tr.

54–55). He lay down across the foot of Ellison's bed (in which Ellison was also reclining) and evidently remained there for two or three hours until the arrival of the landlord, who insisted that appellant and another man leave (J.A. 5–6). A few minutes later appellant returned and was admitted by Viola Maples (J.A. 11, 19). As soon as Viola opened the door and turned to go back upstairs, appellant "came up the steps real fast, swearing" (J.A. 19) and accused Viola and Woodrow (the decedent) of stealing some money from him (J.A. 11–12, 19).

Appellant then went into Ellison's room and through the open door into the adjoining room, where he found Woodrow Agurs lying in bed (J.A. 6, 19). Appellant began to beat and kick Agurs. Delores Brown testified that she stood in the open doorway, "watching Melvin Jackson when he was stomping Woodrow * * * just lifting up his feet, letting it down * * * about six or seven times" on Agurs' head (J.A. 19–20). When she first looked into the room, Agurs was no longer in bed but on the floor behind the bed (Tr. 62), and appellant was standing over him, "just stomping him" (J.A. 19). Agurs offered no resistance (J.A. 20, Tr. 63). The two men, Mr. Brown and Mr. Ellison, did not see the altercation, but both of them heard some "licks being passed" in the adjacent room (J.A. 6–7, 12), and Brown pointed out that there "wasn't nobody in there but them two" (J.A. 12). Both the Browns heard Agurs insist that he did not have appellant's money (J.A. 12, 19). After about five minutes (J.A. 20, Tr. 62) appellant desisted, and as he left the room and passed through Ellison's adjacent room, he began to beat Viola Maples (J.A. 8, Tr. 59, Cor. Tr. 14). Viola promptly fled, whereupon appellant went downstairs and out the front door (Tr. 33, Cor. Tr. 14).

(It may be noted that Albert Brown testified that appellant started beating Viola just before he entered Agurs' room (J.A. 12). All the other witnesses, however, both at the trial and at the coroner's inquest, including Viola herself, testified that appellant attacked Viola as he was on his way out of Agurs' room (J.A. 8, Tr. 58–59, Cor. Tr. 14).)

Edward Milligan, the landlord of the premises at 614 N Street, was the next witness for the Government. He testified

that on the afternoon of November 17 he went to 614 N Street and found several men, including appellant, sitting around in Ellison's room. Milligan decided that there were too many people in one room and ordered appellant and two others to leave. They left (J.A. 21). Delores Brown had previously testified that the time of their departure was about 3:50 p.m. (Tr. 55). Milligan himself left and returned to his home, which was right around the corner (J.A. 21, Tr. 69).

A few minutes later, around 4:15, appellant appeared at Milligan's door and said that Woodrow had stolen some money from him and that he had just beaten Woodrow. Milligan advised appellant to call the police and went back upstairs (J.A. 21, Tr. 70). At the time Milligan did not notice any blood on him, but he acknowledged that he did not take a very close look at appellant or his clothing (Tr. 70–71).

The two remaining Government witnesses were police officers, Private Copeland of No. 2 Precinct and Detective Hack of the Homicide Squad. Officer Copeland testified that he and his partner had arrested appellant on November 17 at 10:48 p.m., the arrest being made after he ascertained that appellant's name was in fact Melvin Jackson. Detectives from the Homicide Squad were already in the neighborhood looking for appellant, and the Homicide Squad cruiser arrived within a minute at 6½ and N Streets, N.W., the place of arrest, less than half a block from the scene of the crime (Tr. 74). The two arresting officers and appellant got into the car with the detectives and drove to Police Headquarters (Tr. 75). Officer Copeland testified that he had checked appellant's clothing before placing him in the cruiser and had noticed bloodstains on his shoes and the bottom of his trousers (J.A. 22).

Both officers testified that during the fifteen-minute ride to Police Headquarters, after appellant had been advised of his rights and told that anything he said could be used against him, appellant gave two different versions of what had happened that afternoon. At one point he stated that as he entered Agurs' room at 614 N Street, Agurs had fallen to the floor, unconscious. At another point appellant told the officers that Agurs had collapsed on the bed when he walked into the room (J.A. 22, 23). Detective Hack further testified that shortly

after their arrival at the Homicide Squad office, around 11:10 p.m., appellant repeated his story about Agurs' having fallen to the floor. At no time did appellant say anything about any money having been stolen from him by either the decedent or Viola Maples, and he affirmatively denied having had any fight with the decedent (J.A. 23). Detective Hack identified the stained shoes and trousers which appellant was wearing at the time of his arrest, and they were admitted into evidence without objection (J.A. 24). The stains, incidentally, were not identified as blood but merely as "having the appearance of blood."

Evidence for the Defendant

Appellant's entire case rested on his own testimony. According to his story, appellant had gone to 614 N Street to repair a stove, which he said he would do if he were paid by the landlord, Mr. Milligan (J.A. 26–27). After he got inside he engaged in conversation with the other occupants of the premises, and Agurs left a moment later to buy some liquor. When he returned, everyone had a drink except appellant, who abstained in accordance with his usual practice (J.A. 27). (It may be noted that all the Government witnesses who had seen appellant on November 17 testified that he had been drinking, although he was not drunk; Albert Brown testified that appellant "had been drinking but he had done slept it off" (J.A. 13).) Appellant testified that he dropped off to sleep on Ellison's bed and did not wake up until after Mr. Milligan had arrived. Milligan gave appellant some money to purchase some stop leak with which to repair the stove, and the two of them left together (J.A. 28). As he crossed the street in front of 614 N, he discovered that his wallet was missing, and he turned around and went back to 614 to see if it was there. He asked Ellison and Viola Maples about the wallet, but both denied any knowledge of it. Then he went to ask Woodrow Agurs. Woodrow appeared in the doorway of his room and announced that he was ill, that his breath was "cutting off." Appellant asked him about the money, but Woodrow turned away from him. As he went back toward his bed, Woodrow fell to the floor, and when appellant helped him to his feet, he noticed

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that the sick man had blood on his face (J.A. 29). Appellant helped him to his bed, and Agurs sat down while appellant went to get a rag to wipe off the blood. When appellant returned, he found that Agurs had fallen from the bed against the wall. He picked him up, wiped his face, and left because he was late for work, believing that Agurs had merely had one of his usual sinking spells (J.A. 29–30). On cross-examination appellant denied having taken a drink, denied having kicked Agurs in the head, denied any knowledge as to how the bruises and lacerations got on Agurs' face, and denied having told Mr. Milligan that he had beaten Agurs (J.A. 31–32, Tr. 119–120).

Instructions and Verdict

The court then charged the jury, instructing them in some detail as to the difference between second-degree murder and manslaughter, which the court identified as a lesser included offense (J.A. 35–37). The instruction of the court on this point was to the effect that malice, which the court took pains to define, was a necessary element of second-degree murder but not of manslaughter. Counsel for both sides expressed their satisfaction with the instructions (J.A. 37–38). Some time later, in response to a request from the jury, the court substantially repeated its instruction on the difference between second-degree murder and manslaughter and amplified its definition of malice by means of an example (J.A. 39–40). The jury retired again to the jury room and returned in little more than a half hour with a verdict of guilty as charged.

STATUTE INVOLVED

Title 22, § 2403, District of Columbia Code, provides:

> Whoever with malice aforethought, except as provided in sections 22–2401, 22–2402, kills another, is guilty of murder in the second degree.

RULE INVOLVED

Rule 52, Federal Rules of Criminal Procedure, provides:

> **(a) Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

I

Death of the decedent was caused by the presence of blood in his lungs. This blood had emanated from the injuries to his head inflicted by appellant. There is a direct causal connection between appellant's acts and decedent's death. The decedent's state of intoxication was not sufficient to constitute an intervening cause so as to absolve appellant of his criminal responsibility.

II

Appellant was not denied effective assistance of counsel because his attorney failed to obtain a coroner's transcript in order to impeach two Government witnesses by demonstrating certain inconsistencies in their testimony. Such failure does not come up to the established standard of ineffective assistance of counsel which requires correction upon review. Moreover, the alleged inconsistencies are only apparent, not real.

III

No error was committed by the trial court in limiting cross-examination of the witness Albert Brown. The extent of cross-examination is within the sound discretion of the trial court. The question which the court, on objection from the Government, did not permit the witness to answer dealt with a matter neither material nor relevant. Its stated purpose was "to show the nature of the witness' employment." No showing was made of bias or prejudice, and the possibility of bias in this instance was so remote that the proffered testimony was properly excluded. The court did not abuse its discretion.

IV

No error was committed by the trial court in allowing testimony concerning appellant's beating of Viola Maples. The attack on Viola and the attack on Woodrow Agurs, which re-

sulted in the latter's death, were part of one continuing transaction and closely coincided in time, place, and circumstances. Consequently, evidence of the beating of Viola was properly admitted (without objection from appellant) under one of the recognized exceptions to the general rule against the admissibility of evidence of other crimes.

V

No error was committed by the trial court in allowing testimony by police officers not qualified as experts regarding the presence of bloodstains on appellant's clothing. The appearance of blood is a matter of common knowledge and thus is not a proper subject for expert testimony; indeed, it would have been error for the court to permit expert testimony on such an issue.

VI

The trial court did not commit "plain error" in failing to give a missing witness instruction. The absence of the witness was satisfactorily explained by another witness, without any objection from appellant. Moreover, such an instruction was not requested by appellant or his counsel, and it is possible that counsel deliberately refrained from requesting one as a matter of trial strategy.

VII

Evidence of malice was abundant and was sufficient to sustain a conviction of second-degree murder. The facts clearly show that appellant did not undergo any change in his violent state of mind at the moment the decedent fell to the floor so as to eliminate the possibility that he acted with malice; on the contrary, his mental state remained the same throughout the entire sequence of events and was amply demonstrated to everyone present. Malice need not be expressly shown but may be implied by law from the acts committed by a wrongdoer. The court's instructions on malice were not erroneous but are fully supported by authority. The jury was warranted in its finding.

ARGUMENT

I. Appellant's acts were the proximate cause of death

Appellant kicked Woodrow Agurs several times in the head, and as a result Agurs died. The fact that Agurs was drunk does not exonerate appellant of his responsibility. The causal connection between appellant's acts and Agurs' death was clearly testified to by the Deputy Coroner. The blood flowing from the injured parts found its way into the decedent's lungs, where it caused them to become congested and clogged, thereby killing him. The intoxicated condition of the decedent, although it admittedly "could have had some bearing" on the result, was not sufficient to constitute an independent intervening cause so as to relieve appellant of responsibility for the death.

The question of what constitutes proximate cause is one for the jury. Generally "it must appear that the injury was the natural and probable consequence of the * * * wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Milwaukee and St. Paul Ry. Co.* v. *Kellogg*, 94 U.S. 469, 475 (1877); accord, *Howard* v. *Swagart*, 82 U.S. App. D.C. 147, 161 F. 2d 651 (1947). The particular harm resulting from the wrongdoer's act need not have been foreseen; all that is required is that some harm or injury could and should have been foreseen. *Boland* v. *Love*, 95 U.S. App. D.C. 337, 222 F. 2d 27 (1955); *Roberts* v. *United States*, 316 F. 2d 489 (3d Cir. 1963). A pre-existing condition is not necessarily the proximate cause of an injury if it is aggravated or triggered by the act of a defendant; the question is for the jury to decide. *Hanna* v. *Fletcher*, 97 U.S. App. D.C. 310, 231 F. 2d 469, *cert. denied*, 351 U.S. 989 (1956).

Two cases from other jurisdictions appear to be very much in point. In *Thunberg* v. *Panama R.R. Co.*, 139 F. 2d 567 (2d Cir. 1943), the evidence showed that the decedent fell while at work. His fall aggravated an existing hernia, causing it to become strangulated, and the strangulated hernia in turn caused his death. His administratrix sued his employer, alleging negligence in failing to provide a safe place to work.

A verdict for plaintiff was upheld on appeal. The evidence was held sufficient to support a finding that defendant's negligence was the proximate cause of death.

In another case, a man lying on a highway at 2:00 a.m. was struck by a car and killed. The court held that the evidence supported a finding that the negligence of the driver of the car was the proximate cause of death, notwithstanding that the decedent had no business being where he was. The mere fact that the victim was lying in the middle of a public highway on a dark night did not absolve the defendant of responsibility for his death. *Kriesak* v. *Crowe*, 44 F. Supp. 636 (M.D. Pa.), *aff'd per curiam*, 131 F. 2d 1023 (3d Cir. 1942).

Appellant took the decedent as he found him. The certainty of severe physical injury resulting from appellant's acts was fully foreseeable, even though the actual result, Agurs' death, may or may not have been. Consequently, appellant's acts were the proximate cause of Agurs' death. The mere fact that Agurs was very drunk at the time is not sufficient to absolve appellant of his criminal responsibility.

II. Failure of appellant's attorney to obtain a coroner's transcript does not constitute ineffective assistance of counsel

Alleging certain inconsistencies between the testimony at the coroner's inquest and the testimony at trial, appellant now contends that the failure of his trial counsel to obtain a transcript of the inquest [1] amounts to ineffective assistance of counsel. Appellant's attack on his attorney, a reputable member

[1] Contrary to appellant's allegation, the coroner's transcript was not readily available to trial counsel. Appellee wishes to inform this Court that appellant is mistaken in his statement that the prosecutor in a homicide case "ordinarily has the coroner's transcript." Since July of this year a stenographic reporting firm under contract with the coroner has prepared transcripts of inquests as a matter of course, in accordance with the terms of its contract. Prior to that time, however, only one stenographic reporter was employed by the coroner, and his time was relatively limited. Consequently, transcripts were not routinely made. Sometimes a transcript was prepared; sometimes it was not. The decision whether or not to order one was usually a matter of discretion with the Assistant United States Attorney assigned to try the case. Generally he did not request one unless he had reason to believe that it might be beneficial to the Government's case in some way. (Of course, defense counsel also had the privilege of requesting a transcript to be prepared.)

of the bar, is confined to this one point, and for this reason, if for no other, it must fail.

Appellant alleges that he requested his attorney to obtain and use the transcript for impeachment purposes but that the attorney did not do so. However, the only indication on the record that he made such a request is a self-serving statement contained in a *pro se* motion for judgment of acquittal n.o.v. filed two weeks after the jury found appellant guilty (J.A. 41). This same motion also contains an allegation that counsel encouraged appellant to testify falsely and that when appellant "repised" [refused?], counsel put his client on the witness stand, "only asked defendant his name and address and ended his questioning" (J.A. 42). This allegation is belied by the transcript of the trial, which contains thirty-four pages of testimony by appellant, including ten pages on direct examination and one more on redirect (Tr. 93–126). This may well be an indication of the truth or falsity of appellant's allegation regarding his request for the coroner's transcript.

Appellant makes a showing of two apparent inconsistencies between the testimony of witnesses at the inquest and the testimony of the same witnesses four months later at the trial. But in one instance there is no inconsistency, and in the other the seeming variance can be explained.

Let us first consider the testimony of Delores Brown. Appellant asserts that at the inquest she testified that she returned to the kitchen at some point during the altercation while appellant was still kicking Agurs (J.A. 2–3), whereas at the trial she allegedly testified that she saw the fight in its entirety (J.A. 20).

In the first place, these statements are not necessarily inconsistent. From the numerous descriptions of the layout of the rooms (J.A. 12, 14, Tr. 10, 54–55, Cor. Tr. 9) it is quite clear that with all the doors open, as they were that afternoon, a person standing in the kitchen could easily look through Ellison's room, which is next to the kitchen, and beyond into Agurs' room.

Moreover, Delores Brown did testify at the trial, as at the inquest, that she went back to the kitchen for a moment. In answer to a question as to whether she could recall what had

been said in Agurs' room during the altercation, she replied that she could not because she had gone back to the kitchen to look out the window and see if she could find a policeman (Tr. 58). If there was any inconsistency in Mrs. Brown's testimony, it was readily apparent at trial. There was thus no need to obtain a coroner's transcript for purposes of impeachment. To have done so would have been a useless gesture.

The seeming inconsistency in the testimony of Detective Hack may likewise be explained. At the inquest he testified that appellant "made no statement whatsoever" (J.A. 1), and at the trial he stated that appellant "told several stories" regarding the events of the afternoon of November 17 and proceeded to recount two of them (J.A. 23). These two remarks are not necessarily inconsistent. When Detective Hack spoke of a "statement" at the inquest, it is more than likely that he was referring to a formal written and signed statement of the sort which the police customarily obtain in all homicide cases. Mention of such a statement was made, for example, in the testimony of A. G. Ellison, who said in response to a question that he had signed a statement at the Homicide Squad office (J.A. 7). Considering Detective Hack's remark in its context at the coroner's inquest, it is apparent that he was referring to the fact that appellant had given no *written* statement. Only a few moments later, while Detective Hack was still on the stand, he and appellant's counsel engaged in a brief colloquy about "those witnesses who have given statements" (Cor. Tr. 10):

> Q. Those three are here. Have you taken other statements?
>
> A. Yes, sir, I have other statements.
>
> CORONER. He did not refer to other statements, he referred to the statements——
>
> Mr. O'NEILL [appellant's counsel at the inquest]. I want to ask him if he took other statements.
>
> Q. You did take other statements?
>
> A. Yes, sir. (Cor. Tr. 11.)

Thus, it is quite clear from the context that the word "statement," as used by Detective Hack in his testimony (and by appellant's counsel at the inquest and by the coroner as well),

has a specific meaning capable of precise identification. It is equally clear from the context of the detective's remark at the trial that by "several stories" he was referring to the fact that appellant gave inconsistent versions of what had happened on the afternoon of the murder. Detective Hack repeated these "stories" in the next breath (J.A. 23), and his testimony on this point is corroborated by that of Officer Copeland (J.A. 22). The shadow of inconsistency thus vanishes in the cold light of analysis.

Even assuming *arguendo* that the supposed inconsistencies are of any significance, this alone would not cause counsel's failure to obtain a coroner's transcript to escalate to the level of ineffective assistance of counsel. In this jurisdiction, a defendant who claims ineffective assistance of counsel must allege circumstances which, if true, would shock the conscience of the court and render the entire proceedings a farce and a mockery of justice. *Diggs* v. *Welch*, 80 U.S. App. D.C. 5, 148 F. 2d 667, *cert. denied*, 325 U.S. 889 (1945). No such showing has been made by appellant here. Counsel's conduct throughout the course of the trial was quite unexceptionable, as the transcript of the proceedings clearly reflects. Appellant was ably represented by a distinguished member of the bar.

"[A]bsence of effective representation by counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it." *Diggs* v. *Welch*, *supra*, at 8, 148 F. 2d at 670. Obviously, appellant is unhappy with the outcome of his trial and is striving to blame his conviction on his attorney. But he is grasping at a very frail straw. As recently as October of this year this Court took occasion to criticize a convicted defendant who frivolously charged his counsel with ineffective assistance. *Smith* v. *United States*, — U.S. App. D.C. —, — F. 2d — (No. 17,822, decided October 10, 1963). Such a charge "should not be sustained unless it very clearly appears to be well grounded." *Gray* v. *United States*, 112 U.S. App. D.C. 86, 87, 299 F. 2d 467, 468 (1962). Here it is not.

Johnson v. *United States*, 71 App. D.C. 406, 110 F. 2d 562 (1940), the only case cited by appellant on this issue, is not in

point. The facts in *Johnson* were quite different from those in the instant case. Johnson's conviction of first-degree murder was reversed and remanded for a new trial on the ground of newly discovered evidence. An eyewitness to the homicide had testified at the coroner's inquest that the decedent had advanced toward Johnson "in a menacing manner * * * I could see he was pretty mad." This witness, however, disappeared after the inquest and could not be located by the Government to testify at the trial. After conviction Johnson's counsel found the missing witness and submitted an affidavit from him in support of Johnson's motion for a new trial. After a hearing at which this witness testified, the trial court denied the motion. The denial was reversed by this Court, which said:

> If Thomas's testimony had been given at the trial it would have furnished substantial support, which without it was wholly lacking, for appellant's claim that he shot Scandalis because of fear induced by a fresh assault. It therefore called for a new trial. 71 App. D.C. at 401, 110 F. 2d at 563.

The *Johnson* case turned on the issue of newly discovered evidence, not ineffective assistance of counsel.

III. Cross-examination of the witness Albert Brown was properly limited

At the beginning of his cross-examination, after establishing that Albert Brown worked as a handyman and did painting and other work for a man whom he named, appellant's counsel asked the following series of questions:

> Q. Who is—do you do any work for Big Rose?
>
> A. Yes, I do.
>
> Q. Who is Big Rose?
>
> A. Well, she has a house up on 733 Madison Street and me and Melvin [presumably appellant] did some moving for her one time.
>
> Q. And do you work for her selling whisky in the alley——
>
> Mr. COLLINS [Assistant United States Attorney]. Objection to this, Your Honor.

Mr. INGOLDSBY [appellant's counsel]. In the back of 6½ N Street? (J.A. 13–14)

The court sustained the Government's objection, ruling that such a question would be allowed if Brown had been convicted of selling whisky.

Appellant now contends that it was error for the court to cut off cross-examination at this point. Relying principally on *Alford* v. *United States*, 282 U.S. 687 (1931), appellant argues that the question about the whisky "was an essential step in identifying the witness with his environment" (Brief for Appellant, 20), which *Alford* holds is proper cross-examination. Appellant then goes on, however, to engage in gross conjecture, saying that Brown's answer to the question "may have shown" him to be a violator of the law and suggesting that for this reason he "may have been anxious to cooperate with the Government" in return for not being prosecuted himself. Such speculation is entirely unfounded; there is absolutely nothing in the record to support it. Appellant further suggests that Brown "may well have been" the source of the liquor which was consumed at 614 N Street on the afternoon of the murder. Again, there is nothing to indicate that this is any more than an idle guess.

From these hypothetical premises appellant draws the conclusion that the testimony of Albert Brown "may have been biased." But appellant's house of cards must collapse of its own weight. There is nothing in the record to show either the possibility of bias or the intention of appellant's trial counsel to uncover such bias by cross-examination (J.A. 13–14, Tr. 36–37). The only stated purpose of the challenged question was "to show the nature of the witness' employment." But this is not synonymous with "identifying the witness with his environment," the issue which was involved in the *Alford* case. If such was counsel's purpose (and the record indicates that it was not), counsel should have prefaced his inquiry with a question such as "Do you do any other kind of work for Big Rose?" To plunge right into such an area of inquiry without laying a proper foundation was clearly improper, and the trial court quite rightly sustained the Government's objection.

If counsel's purpose, murky as it may appear from this distance, was to impeach the witness by attacking his credibility, then clearly the question was objectionable. Evidence offered for the purpose of impeaching a witness must be evidence as to the witness' general reputation for truthfulness. The impeaching party "will not be allowed to prove the commission of specific acts of untruthfulness *or other bad conduct.*" Underhill, Criminal Evidence § 233 (5th ed. 1956). [Emphasis added.] In *Sacks* v. *United States,* 41 App. D.C. 34 (1913), in a prosecution for carnal knowledge, evidence of the complainant's "bad reputation for chastity" was held inadmissible, though offered for the purpose of affecting credibility. (Consent on her part, of course, was not in issue, since she was only twelve years old.) See *Duke* v. *United States,* 255 F. 2d 721, 728 (9th Cir.), *cert. denied,* 357 U.S. 920 (1958); cf. *Salgado* v. *United States,* 278 F. 2d 830 (1st Cir. 1960), wherein it was held that evidence of a witness' general reputation as a homosexual might be admissible to show bias or prejudice, but even then evidence of specific homosexual acts with other persons was held to be inadmissible.

The Supreme Court in *Alford* v. *United States, supra,* expressly recognized the well-established principle that the extent of cross-examination, even on an appropriate subject of inquiry, is within the sound discretion of the trial court. Appellant has conceded as much (Brief for Appellant, 20). In *United States* v. *Lester,* 248 F. 2d 329 (2d Cir. 1957), one of the cases cited by appellant in support of his position, the court in an opinion by Judge Medina pointed out that counsel in cross-examination may bring out facts tending to show bias or prejudice, or an interest in the outcome of a case, or some other motive to testify falsely, but that he may not cross-examine on collateral matters merely to show that the witness is unworthy of belief (with the recognized exception of criminal convictions). Moreover, the court made the observation that "there are circumstances of so little probative force on the subject of a motive to falsify that they may be excluded in the discretion of the trial judge * * *." 248 F. 2d at 334–335. Such is the case here. In *United States* v. *Rich,* 262 F. 2d 415 (2d Cir. 1959), the refusal of the trial court to permit on cross-examination a question

as to the residence of a Government witness was upheld on appeal because counsel had failed to show its materiality. See *Mays* v. *United States*, 261 F. 2d 662 (8th Cir. 1958). Even assuming *arguendo* that Brown did engage in the illicit sale of whisky, the connection between such activities and the murder of Woodrow Agurs would have been so tenuous as to have little or no probative value. The trial court excluded that evidence in the exercise of its sound discretion, and that exercise should not be disturbed.

IV. Admission of testimony as to the assault on Viola Maples was not "plain error"

In contending that it was "plain error" within the meaning of Rule 52(b) for the trial court to allow testimony regarding appellant's beating of Viola Maples, appellant cites ample authority in support of the general rule that evidence of an offense other than the one with which a defendant is charged is not *ordinarily* admissible at his trial. But there are, as appellant concedes (Brief for Appellant, 17), citing *Fairbanks* v. *United States*, 96 U.S. App. D.C. 345, 226 F. 2d 251 (1955), numerous exceptions to the general rule. The testimony of which appellant now complains falls within one of these well-recognized exceptions.

This Court in *Fairbanks* listed several instances to which the general rule does not apply, and one of them is applicable to the instant case. Evidence of other criminal acts is admissible when they "are so blended or connected with the one on trial that proof of one incidentally involves the other * * *." 96 U.S. App. D.C. at 347, 226 F. 2d at 253. Such is obviously the case here. The time, place, and circumstances of the two offenses are all identical; the assault on Viola Maples was virtually simultaneous with the killing of Woodrow Agurs. Appellant ceased kicking Agurs, turned and went a few steps into the next room, and immediately began beating Viola Maples. The two incidents could be no closer in time unless Viola had been standing over the prostrate form of Woodrow Agurs so that appellant could have beaten her with his hands while using his feet on the decedent. Clearly, the beating of Viola Maples was part of the res gestae, and it is well established that

proof of all of the res gestae is always admissible, even though it may include evidence of another and independent crime by the defendant at the same time as the one for which he is being tried. *Gianotos* v. *United States*, 104 F. 2d 929 (9th Cir. 1939).

In addition to the close physical and chronological proximity of the two offenses, the logical connection between them is strong and plain. "Evidence of another crime is admissible where the other offense is logically connected with that charged, or where the acts are so closely and inextricably mixed up with the history of the guilty act itself as to form part of the plan or system of criminal action." *United States* v. *Crowe*, 188 F. 2d 209 (7th Cir. 1951); see *Shelton* v. *United States*, 205 F. 2d 806 (5th Cir.), *cert. dismissed on motion of petitioner*, 346 U.S. 892 (1953). The assault on Viola Maples meets both of these tests. Appellant had accused *both* Viola and Woodrow of stealing his money. He had come to the place where he had last seen both of them. He assaulted them both in turn. One died; the other did not. Though technically the assault on Viola is distinct from that on Woodrow which resulted in his death, the two cannot logically be set asunder. They form part of one continuing transaction or sequence of events, from the time appellant came storming up the stairs until he left the scene after Viola had fled.

The beating of Viola Maples was mentioned in testimony continually throughout the trial, with never any objection from appellant or his counsel. The admission of such testimony certainly cannot be considered as "plain error" under Rule 52(b), for it was not error at all.

V. Admission of testimony as to bloodstains was not "plain error"

Appellant argues that it was "plain error" for the court to permit testimony from the two police officers as to the presence of bloodstains on the shoes and trousers of appellant at the time of his arrest. Such a contention is utterly without merit.

In the first place, only once were the stains referred to by a witness as bloodstains. This was in the testimony of Officer Copeland, where he stated that he checked appellant's clothing

before placing him in the police cruiser and observed "a blood stain, stains" on the trousers and "blood stain also" on the shoes (J.A. 22). This testimony was not objected to by appellant's counsel (Tr. 75). A brief passing mention was made a moment later by Officer Copeland to "blood on his trousers and shoes," but again without objection (Tr. 76). Detective Hack throughout his testimony referred to the stains as "having the appearance of blood" or "resembling blood" (J.A. 24). Indeed, Detective Hack in an abundance of caution described the murder scene as he found it upon his arrival by stating that "there was a red substance about the bed having the appearance of blood," in close proximity to which the decedent was lying (Tr. 79). The shoes and trousers were identified by Detective Hack and introduced into evidence as Government's Exhibits Nos. 1 and 2, again without objection from appellant's counsel (J.A. 24–25).

The shoes were later shown to appellant on cross-examination, and he identified them as his own (Tr. 120). Appellant was asked how he accounted for the presence of blood on his shoes, whereupon appellant's counsel objected to the question on the ground that the stains had not been identified as blood. The court sustained the objection (J.A. 33–34). If indeed it was error for the court to permit the officers to testify as they did regarding the bloodstains (and appellee does not concede that it was), then clearly the error was cured when the court sustained the objection and ruled in appellant's favor. It may be noted that appellant himself testified as to the presence of blood (not merely a substance resembling blood) on the decedent's face, both on direct examination (J.A. 29) and on cross-examination (J.A. 32).

The appearance, color, and consistency of blood are matters of common knowledge. Everyone at some time in his life has suffered a cut or an abrasion and has seen blood flowing from the wound. No special training or expertise is required to recognize a given red substance as blood, especially when there are surrounding circumstances which would support such an inference, as there were in this case. The officers knew there had been a homicide and that the victim had bled profusely. When they saw the stains on appellant's clothing, they

immediately concluded that they were bloodstains—the only logical conclusion under the circumstances.

Expert testimony as to matters of common knowledge is not only unnecessary but may properly be excluded if, in the opinion of the trial judge, all the pertinent facts can be presented to the members of the jury and they as men of ordinary intelligence and understanding can draw conclusions from them without the benefit of special training or experience. Such matters do not call for expert testimony. *Salem* v. *United States Lines Co.*, 370 U.S. 31 (1962); *Duff* v. *Page*, 249 F. 2d 137 (9th Cir. 1957). Moreover, "the trial judge has broad discretion in the matter of the admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous." *Salem* v. *United States Lines*, *supra*, at 35. To require or even to permit expert testimony on matters of common knowledge "would be a clear invasion of the province of the jury and would be erroneous." *Kenney* v. *Washington Properties, Inc.*, 76 U.S. App. D.C. 43, 45, 128 F. 2d 612, 614 (1942).

Although the point does not seem to have arisen in the District of Columbia, there is abundant authority in other jurisdictions to the effect that non-expert witnesses can testify as to the presence of blood or bloodstains. E.g., *Wimis* v. *State*, 216 Ga. 350, 116 S.E. 2d 547 (1960); *People* v. *Preston*, 341 Ill. 407, 173 N.E. 383 (1930); *Daniels* v. *State*, 213 Md. 90, 131 A. 2d 267 (1957). The cases do not draw the line at identification of a substance "resembling" or "having the appearance of" blood but permit such witnesses to call the blood by its rightful name.

Clearly, then, it was not error at all for the court to permit the police officers to testify as to the presence of bloodstains on appellant's clothing. To take the position that it was "plain error" is patently frivolous.

VI. Failure of the court to give a missing witness instruction was not "plain error"

Appellant maintains that the failure of the trial court to instruct the jury regarding the absence of Viola Maples was "plain error" within the meaning of Rule 52(b) of the Federal

Rules of Criminal Procedure. There is nothing in the record, however, to indicate that such an instruction was ever requested or that the explanation given for her absence was unsatisfactory to appellant or his counsel.

A. G. Ellison testified twice as to the present whereabouts of Viola Maples. During cross-examination, in answer to a question by the court, Ellison stated that Viola had formerly resided at 614 N Street, N.W., "but she ain't been there since, you know, she got hurt. She been in the hospital" (Tr. 24). Later, on redirect examination, Ellison testified, "She is in the hospital, I heard. * * * Say that she got a leg broke" (J.A. 10). On neither occasion did counsel for appellant object to such testimony or manifest any concern whatsoever. The fact that Ellison was "an unemployed welfare worker whose past time [*sic*] includes the drinking of 'smoke' " (Brief for Appellant, 23) does not affect the truth or falsity of his testimony but merely goes to his credibility, and the credibility of a witness is a matter solely within the province of the jury. Evidently the jury accepted Ellison's explanation; they had no reason not to.

This issue was resolved in *Trent* v. *United States,* 109 U.S. App. D.C. 152, 284 F. 2d 286 (1960), *cert. denied,* 365 U.S. 889 (1961). In *Trent,* as here, the failure of the trial court to give a missing witness instruction, although it was not requested by the defendant, on appeal was assigned as "plain error" under Rule 52(b). This Court held that even if the evidence might have warranted such an instruction, had one been requested, the failure of the trial court so to instruct the jury without such a request was not "plain error." The Court pointed out that "it is often a carefully calculated defense tactic *not* to ask for such an instruction in a close case thus leaving the defense free to press upon the jury the prosecution's failure to call an alleged 'missing witness.' " Id. at 156, 284 F. 2d at 290. [Emphasis in original.]

The case of *Bartley* v. *United States,* —U.S. App. D.C.—, 319 F. 2d 717 (1963), relied on by appellant, is not in point. That case does not concern a missing witness at all but rather deals with the admission into evidence of a prior inconsistent statement by a Government witness. Under the facts in that

case the prior statement assumed considerable importance, and this Court reversed the conviction because the trial court had failed to give an adequate instruction on the admission of the statement. Clearly, *Bartley* has no bearing here.

VII. Evidence of malice was sufficient to sustain a conviction of second-degree murder, and the court's instructions on malice were not erroneous

Appellant was indicted, tried, and convicted of murder in the second degree. In its instructions to the jury the trial court defined the elements of this offense with regard to appellant as follows:

> (1) That the defendant inflicted a wound, or wounds or an injury, or injuries, from which the deceased died; and (2) That the defendant acted with malice when he wounded the deceased (J.A. 35).

The court further identified manslaughter as a lesser included offense in the crime of second-degree murder and defined manslaughter as "the unlawful killing of a human being without malice" (J.A. 37). Appellant now attacks that portion of the court's instructions in which the court defined malice, particularly an example (J.A. 39) which appellant contends was misleading and therefore erroneous.

The fundamental difference between manslaughter and second-degree murder is the presence or absence of malice in the mind of the killer. Malice is not limited to a deliberate, malevolent design or plan to take the life of another. It may also include "a generally depraved, wicked and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief." *Allen* v. *United States*, 164 U.S. 492 (1896); see *Marcus* v. *United States*, 66 App. D.C. 298, 86 F. 2d 854 (1936); *Sabens* v. *United States*, 40 App. D.C. 440 (1913). "It is a state of mind * * * which prompts a person to do an injurious act wilfully to the injury of another." *United States* v. *Edmonds*, 63 F. Supp. 968, 970 (D.D.C. 1946). It may be implied by law from the wilful or wanton acts of the wrongdoer. *Allen* v. *United States, supra; Marcus* v. *United States, supra.*

The example of malice given by the trial court, of which appellant now complains, could well have come from the case

of *Nestlerode* v. *United States*, 74 App. D.C. 276, 122 F. 2d 56 (1941). In *Nestlerode* the defendant drove his car in a wanton and reckless manner at an extremely high speed from nearby Virginia into the northeast section of the District of Columbia, thence back across the city along H and M Streets, around the wrong side of Thomas and Scott Circles, until he crashed just north of Dupont Circle at Connecticut Avenue and Q Street N.W., where he was overpowered by a policeman and arrested. During the course of his wild ride he struck and killed two persons with his automobile. He was tried on a two-count indictment for second-degree murder. The jury found him guilty as indicted in one instance and guilty of manslaughter in the other. This Court upheld both convictions, observing that Nestlerode had driven his car "in total disregard of the lives and safety of others. * * * Malice is presumed under such conditions." 74 App. D.C. at 279, 122 F. 2d at 59. Cf. *Lee* v. *United States*, 72 App. D.C. 147, 112 F. 2d 46 (1940). F Street on a Saturday afternoon is full of pedestrians and vehicular traffic. If someone drove a car down F Street at sixty miles an hour and ran over a pedestrian under such circumstances, malice could easily be presumed there also. Clearly, the challenged instructions were not erroneous.

As to the sufficiency of the evidence, there was ample testimony on which the jury could have based a finding of malice so as to sustain a verdict of guilty of murder in the second degree. The evidence showed that appellant came bursting in and tore up the stairs as soon as Viola Maples had opened the door for him. He was clearly in a vindictive and belligerent frame of mind and immediately began to accuse Viola and Woodrow of stealing his money. He dashed into Woodrow's room, started a fight with him, knocked him to the floor, and, without giving him a chance to defend himself, began to kick him in the head until he became senseless. Surely there is enough here to warrant a finding by the jury that appellant acted with malice, with "a mind deliberately bent on mischief." *Allen* v. *United States*, *supra*.

In support of his position appellant relies solely on the case of *United States* v. *Hamilton*, 182 F. Supp. 548 (D.D.C. 1960). But the facts in *Hamilton* are distinguishable. In that case a

quarrel occurred in a poolroom between the defendant and the decedent. The proprietor asked both to leave, and the quarrel continued on the street corner outside. A fight developed, and the decedent was knocked to the ground. At this point the defendant "apparently exploded in a fit of ungovernable rage and jumped on the face of the deceased and kicked him in the head as well." 182 F. Supp. at 549. The decedent was taken to a hospital, where he died the next morning. The defendant was charged with second-degree murder. The case was tried to the court without a jury. The court found the defendant guilty only of manslaughter, stating that it had a reasonable doubt as to the existence of malice and was obliged to resolve such doubt in the defendant's favor.

The evidence in the instant case is different. There was no apparent explosion on the part of appellant, no sudden change of mood, no "fit of ungovernable rage." Appellant's hostile state of mind was readily apparent to all from the moment he came up the stairs. His singleness of purpose was abundantly plain. He was not seized by any uncontrollable passion as he started to kick Woodrow Agurs in the head. In the time it took for him to come up the stairs and cross into Agurs' room he could easily have entered into that state of mind which the law designates as malice. The evidence supports a finding of malice by the jury and appellant's consequent conviction of second-degree murder.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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FRANK Q. NEBEKER,
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U.S. GOVERNMENT PRINTING OFFICE: 1963

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,807

MELVIN JACKSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING EN BANC

Comes now the appellant, pursuant to Rule 26 of the rules of this Court, and petitions for a rehearing en banc on this appeal. In support whereof it is respectfully submitted as follows:

Preliminary Statement

This is an appeal from a conviction of second degree murder. The Grand Jury charged that petitioner murdered one Samuel W. Agurs with malice aforethought by beating him with his fists and kicking him with his feet. Petitioner entered a plea of not guilty to the charge and after a trial by jury he was found guilty as charged. Petitioner was

sentenced to imprisonment for a period of ten to thirty years.

The case was heard by a division of this Court on November 18, 1963, which included Circuit Judges Charles Fahy, George T. Washington, and J. Skelly Wright. On December 12, 1963, a Per Curiam opinion of that division was released, affirming the District Court's judgment of conviction. Circuit Judge J. Skelly Wright took no part in the consideration or decision of this case.

A complete statement of the facts in this case is set forth in petitioner's-appellant's brief on appeal at pages one through nine, and this petition will be limited to those facts necessary to clearly state petitioner's grounds for seeking this rehearing en banc.

The grounds for the relief sought herein follows:

Petitioner Was Deprived Of Effective Assistance Of Counsel

Petitioner was denied effective assistance of counsel as guaranteed by the Sixth Amendment to the Federal Constitution when his court-appointed trial counsel (a) refused or neglected to obtain and use the coroner's transcript to impeach the testimony of the government witnesses, (b) failed to object to the admission of evidence of an offense other than the one with which appellant was charged, (c) failed to request the trial court to instruct the jury regarding the failure of the government to call a material witness, whose absence was not satisfactorily explained, (d) failed to object to the opinion testimony of police officers regarding the unidentified stains

on the petitioner's apparel, and (e) failed to object to that portion of the trial court's instruction to the jury which sought to give an example of second degree murder.

(a) The Coroner's Transcript. Petitioner's trial counsel refused or neglected to obtain and use the coroner's transcript to impeach the testimony of the government witnesses. The transcript of the proceedings before the Coroner was available to trial counsel for such purposes, or if it was not readily available, counsel could have made the proper motion to have it made available for such purposes. The failure of the trial counsel to obtain and use the transcript for impeachment purposes after being requested to by the petitioner was more than a mere mistake of judgment or an error in trial tactics, it amounted to a sub-standard level of service which dictates a conclusion that the representation of petitioner was inadequate. Johnson v. United States, 110 F.2d 562, 71 U. S. App. D. C. 400 (1940). And see the concurring opinion of Circuit Judge J. Skelly Wright of this Court in Nickens v. United States (No. 17735 decided September 19, 1963) wherein Judge Wright observed that a transcript of a first trial may be required for effective defense in a second trial.

(b) Other Offenses. During the trial in the instant case, an abundance of evidence was admitted, without objection, concerning the assault upon the person of one Viola Maples by the petitioner. This evidence was more prejudicial than probative and its admission was

error. The evidence was not significantly relevant to the offense charged. It tended to prove that appellant was a "bad guy" and the jury may well have leaped from the fact of commission of an assault on a woman to the conclusion of the commission of the murder. The fact, if it was a fact, that petitioner had assaulted a woman on the same day as the alleged homicide, threw no light whatever on the question as to whether he was guilty of murder. Trial counsel had a duty to object to such evidence. Moreover, it was reversible error for the trial court to have permitted the admission of evidence of another offense. Its admission was plain error affecting substantial rights. Rule 52(b), Federal Rules of Criminal Procedure.

(c) Missing Witness. There was a missing witness in the case below whose name is Viola Maples. She testified at length during the coroner's inquest (Coroner's transcript 12-19). During the trial no less than three of the Government's witnesses placed her at the scene of the alleged crime. If produced, Miss Maples would apparently have been a key witness, yet the Government chose to proceed with the prosecution without her. The issue as to this missing witness reduces itself to the question as to whether the Government sufficiently accounted for or satisfactorily explained her absence. The Government did not produce a witness with actual knowledge of the reasons for the absence of Miss Maples, nor did it tender hospital records. It relied on the hearsay statements of an unemployed welfare worker whose past time includes drinking of "smoke".

Consequently, the Government failed to meet its burden and the presumption was raised that the testimony of Viola Maples would have been adverse to the Government. Yaw v. United States, 228 F.2d 382 (9th Cir. 1955); Schumacher v. United States, 216 F.2d 780 (8th Cir. 1954); Scanlon v. United States, 223 F.2d 382 (1st Cir. 1955); Billeci v. United States, 184 F.2d 394, 87 App. D. C. 274 (1950). Where, as here, the failure of the government to call a witness who could to some extent have contradicted defendant's testimony, if it were untrue, further justifies the presumption that her testimony would have been against the government. Wesson v. U.S., 172 F.2d 931 (C.A. Ark. 1949). The appointed trial counsel for petitioner should have objected to the hearsay testimony regarding the whereabouts of the missing witness and should have requested the trial court to give the standard "missing witness" instruction which would include the applicable law here discussed. Moreover, the failure of the trial court to so instruct the jury was plain error affecting substantial rights.

(d) Blood Stain Testimony. A precinct private with only two years of experience on the police force was allowed to testify, without objection, that the petitioner's trousers and shoes had bloodstains on them. Similarly, a detective was allowed to testify, without objection, as to stains on the clothing and shoes of the appellant, "having the appearance of blood". While it may not always be necessary to identify blood or bloodstains by chemical analyses, it is definitely necessary where, as here,

there was not a large quantity of the substance in question, and where, as here, the persons that sought to identify the substance were not held out to be experienced in the field. The officers were at liberty to testify to the fact that there were red stains on petitioner's shoes and trousers but it was plain error to permit them to testify as to their opinion that the stains were blood or "resembled blood". The testimony was highly prejudicial to the rights of the petitioner and should have been strenuously objected to by trial counsel.

(e) Misleading Instructions. The crucial issue in the minds of the jurors was apparently whether petitioner was guilty of manslaughter or second degree murder. After receiving a lengthy but not necessarily clear instruction, the jury requested a copy of the trial court's charge "particularly that portion having to do with the distinction between second degree murder and manslaughter". Thereafter, the trial court endeavored to explain the distinction by way of example of what constitutes murder in the second degree:

> "I might give you an example of that which would not apply to the facts of this case but suppose somebody got in an automobile on a Saturday afternoon on F Street and ran down F Street at 60 miles an hour and ran over and killed somebody. That could be second degree murder and the disregard for human life could be to such an extent that it would constitute malice just as an example."

This example given by the trial judge was misleading. The assumed fact situation given by the judge amounted to an example of manslaughter or negligent homicide, but without additional facts, not second degree murder.

When the jury considered and compared this graphic example given by the trial court with the government's version of petitioner's actions, they were obviously misled into thinking that second degree murder could be unwittingly and easily committed. The jury may well have reasoned that if one could be convicted of second degree murder by causing a death driving a car at a high rate of speed down a busy avenue, then certainly causing a death by physically assaulting a fellow human being must be at least as serious. The misleading example given by the trial judge involved the crucial issue and amounted to reversible error. The defect in the instructions was not called to the attention of the trial court at any stage of the proceedings. This, too, constitutes reversible error.

The Trial Court Erred In Disallowing Cross-Examination Of A Government Witness Concerning His Background

Cross-examination is a matter of right and it may be used as a means to probe a witness's background in the community wherein he resides and works so that the jury may interpret his testimony in the light reflected upon it by knowledge of his environment. Alford v. United States, 282 U.S. 687 (1931). In the Alford case, the government called a witness who gave damaging testimony with respect to various transactions of the accused. Upon cross-examination questions seeking to elicit the witness's place of residence were excluded on the government's objection that they were immaterial and not proper cross-examination. Counsel for defense insisted that the questions were proper cross-examination, and that the

jury was entitled to know "who the witness is, where he lives and what his business is." After the jury was excused, defense counsel also revealed that the witness was in the custody of federal authorities and that such fact might be brought out for showing bias and prejudice. The trial court disallowed cross-examination on the point saying that only felony convictions could be shown. The Court of Appeals upheld the trial court. The Supreme Court reversed, stating, in pertinent part (282 U.S. at 692):

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply (citing cases). It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them (citing cases). To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

In the present case, defense counsel had established that Albert Brown, a government witness, worked for a certain individual. The next question was "And do you work for her selling whiskey in the alley -- in the back of 6-1/2 N Street". The Government prosecutor objected and the trial court sustained the objection indicating that he would only permit defense counsel to show convictions (J.A. 13, 14). Defense counsel stated he was "trying to show the nature of witness's employment" (J.A. 14). The

question was an essential step in identifying the witness with his environment, to which cross-examination may always be directed. The trial court is under no obligation to protect a witness from being discredited or embarrassed. The trial in the instant case cut off in limine all inquiry on a subject to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error. Alford v. United States, supra.

Petitioner's Acts May Not Have Been The Proximate Cause of Death

To warrant a conviction for homicide, the death must be the natural and probable consequence of the unlawful act, and not the result of an independent intervening cause in which the accused does not participate. It appears that the act of the petitioner was not the prominent cause of death for which he is being prosecuted, but that another cause intervened, with which he was in no way connected and but for which death would not have occurred. Such supervening cause is a good defense to the charge of homicide. (See 26 Am. Jur., Homicide, §50 and cases cited therein). Trial counsel should have requested further instruction regarding the proximate cause of death.

The physician who performed the autopsy testified that the death involved was from "asphyxia due to aspiration of blood and gastric content due to trauma about the face and head". He explained that the blood from the deceased's nose had blocked up the lungs. The condition

of the deceased was described as "just about" dead drunk as his blood level of alcohol was high enough to render him almost helpless. The physician admitted that the drunken condition of the deceased had a bearing on the latter's inability to dispose of the blood in his system. He testified that the normal response of the body of a sober person would be to "cough up" the blood. The combination of the trauma to the head of the deceased and his drunken condition apparently prevented the normal response.

Assuming, arguendo, that petitioner was responsible for the injury, the intervening cause of the death was the inability of the deceased to cough up the blood to prevent asphyxiation. Had the deceased not been stone drunk he would probably be alive today. His drunken condition, more than anything, was the real cause of his death. At least it raises a reasonable doubt whether the act of the appellant was the proximate cause. Petitioner is facing a ten to thirty year sentence for this offense. Any substantial doubt should be resolved in his favor.

WHEREFORE, it is respectfully urged that this appeal be reheard en banc.

Respectfully submitted,

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(Appointed by this Court)

I certify that this Petition is presented in good faith and not for purposes of delay.

Forbes W. Blair

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1964, a copy of the foregoing petition was served upon the appellee by leaving a copy thereof at the offices of the United States Attorney for the District of Columbia.

/s/ Forbes W. Blair
Forbes W. Blair